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# State as the Absent Parent: Child Marriage in Sindh, Pakistan

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## Executive Summary

Child marriage is complicated to analyse because it is not an internally consistent or homogenous category; it has various forms, shapes and colorations which are continuously subject to change. They could be entered into consensually, voluntarily, by force, by coercion, by deception, or simply for safety reasons. In Pakistan alone, child marriage can manifest itself in multiple ways. This includes the promise of marrying off an unborn child (*Pait Likhi*); the marrying off of a female child to resolve a conflict (*Badl ul Sulh, Swara, Vani, Sangchatti*); the devoting of a female child to religion to avoid giving her share in inheritance (*Haq Baksha*); and the marrying of a girl to the brother of her own brother's wife (*Vatta Satta*). Child marriage in Pakistan also includes the marrying off of a toddler to an adult man; the marrying off of two children to each other; the marrying off or forced baiting of a female child to convert her religious faith; the marrying off of a child owing to fear of her being raped and/or forcibly converted from her faith; and the marrying off of a stateless child for the sake of identification documents. Teenagers choosing to marry in order to seek freedom and mobility and to resist societal and parental confines of sexually permissive behaviors is another form of child marriage prevalent in Pakistan.

While there exists a nexus between the law prohibiting or regulating child marriage and economic, social, cultural, and religious colorations of child marriage; there is no complete overlap between the two. For example, law and policy surrounding child marriage fail to effectively account for and respond to: (a) the possibility of voluntary child marriage where the contracting parties are close to the age of majority- can a person under the age of majority consent to marriage with an adult? (b) the strength of social norms surrounding child marriage- lack of social will to report child marriages to law enforcement agencies or justice systems; (c) economic reasons that support child marriages (d) whether the marriage itself will be void or voidable after it has been found to be a child marriage? (e) child marriages that are contracted to secure identification or citizenship documents or for fear of forced conversions and (f) whether the adult part to the marriage will be charged with pedophilia and/or rape?

The Sindh Child Marriage Restraint Act, 2013 (SCMRA) and the Sindh Child Marriage Restraint Rules, 2016 framed thereunder, were passed 7 and 4 years ago respectively. The SCMRA was the first in Pakistan to raise the minimum age of marriage of girls to 18 years (from the previously stipulated 16 years). However, the practice of child marriage is reported to be most aggressively prevalent in Sindh when compared to other provinces of Pakistan.

There are several intervening socio-economic factors that obstacle the curtailment or control of the practice of child marriage. These include, but are not limited to religion (the accepted Islamic teaching is that a girl is eligible to marry as soon as she gets her first period and her marriage may be solemnized but not consummate before that); poverty; the need to consolidate family inheritance; lack of economically viable alternatives; cultural norms; sexual control of women; assertion of sexual agency and self-determination; risk of sexual assault; statelessness and/or uncertain citizenship status; threat of forced conversion, limited access to justice and so forth.

On the other hand, several factors also weigh against the practice of child marriage. These include but are not limited to: growing consensus among law, policy and law enforcement circles that child marriage is a violation of the human rights of a child; significant health and psychological risks to a child exposed to early sexual activity, particularly against their will; dangerous health risks to women under the age of 19 and children born to mothers under the age of 19 years; changing social and economic structures that demand that there be two incomes and fewer children in a single household; improved economic alternatives to

marriage; improved access to justice; economic and political incentives for the state to step in and prevent child marriage and so forth.

## 1. Introduction: "Child Marriage" and its Consequences

There is a nexus between the law prohibiting or regulating child marriage, and economic, social, cultural, and religious colorations of child marriage, however, there is no complete overlap between the two. This is largely owing to the fact that child marriage in itself is a complicated concept to analyse. 'Child marriage' is not an internally consistent or homogenous category; it has various forms, shapes and colorations which are continuously subject to change. Child marriages can be entered into consensually, voluntarily, by coercion, by deception, or simply for practical reasons.

The present study aims to contribute to the discussion on child marriages framed through an analysis of the gaps and lacunas that prevent the implementation of the Sindh Child Marriage Restraint Act of 2013 (SCMRA) and the Sindh Child Marriage Restraint Rules of 2016 (SCMRR). The study also recognizes that although the laws on the restraint of child marriage are apparently gender neutral, it is mostly girls and women who suffer the largest share of consequences and risks.<sup>2</sup> Therefore, this study uses a gendered lens to critically analyze prevalence and consequences of child marriage in Pakistan, except where specified. In Pakistan alone, child marriage can mean anything from promising the hand of an unborn child in marriage (*Pait Likhi*), to the marrying off of a girl child to resolve a conflict (*Badl ul Sulh, Swara, Vani, Sangchatti*), to the devoting of a girl child to religion by 'marrying' her to the Quran (*Haq Baksha*), thus prohibiting her marriage to anyone once she is of age (this is commonly done to avoid giving her share in inheritance),<sup>3</sup> to the marrying off of a girl to the brother of the her own brother's wife or betrothed (*Vatta Satta*) before the girl child has attained majority. Child marriage may manifest itself in the form of marriage between a toddler and an adult man or marriage of two children to each other. It may also present itself in the form of forced or exploitatively baiting of a girl child to convert her religious faith by immediately marrying her off into a new faith, or of a child being married off for fear of her being raped and/or forcibly converted from her faith, or a stateless child being married off for the sake of identification documents and/or socio-economic stability. Child marriage also, by definition, includes teenagers (not having yet attained age of majority) choosing to marry in order to seek freedom, mobility and to resist the societal and parental confines of sexually permissive behaviors.

As is obvious from its many forms, child marriage cannot be seen as a standalone practice. It has a rolling effect on the child subject to marriage, upon their community, and society at large. "The practice has important consequences for the health and well-being of women and, consequently, their children. Women who marry early produce more children than who marry later (Nasrullah et al., 2014; Raj et al., 2009). They are younger at the time of first birth and have subsequent births at shorter intervals (Jensen and Thornton, 2003; Koski et al., 2017)"<sup>4</sup>. According to the World Health Organization (WHO) and Girls Not Brides, pregnancy complications and childbirth are one of the leading causes of death amongst girls aged 15 to 19 across the globe; 90% of such pregnancies are within wedlock in the developing world; and a child born to a mother under the age of 19 has a 50% chance of being still born or

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<sup>2</sup>Carpenter, Belinda, Erin O'Brien, Sharon Hayes, and Jodi Death. "Harm, Responsibility, Age, and Consent." *New Criminal Law Review: An International and Interdisciplinary Journal* 17, no. 1 (2014): 23-54, 25. Accessed January 9, 2021. doi:10.1525/nclr.2014.17.1.23.

<sup>3</sup>Sarah Zaman, "Forced Marriages and Inheritance Deprivation in Pakistan" 3, Aurat Foundation, *Policy and Data Monitoring of Violence against Women in Pakistan*, October 2014, [https://www.researchgate.net/publication/325011498\\_Forced\\_Marriages\\_and\\_Inheritance\\_Deprivation\\_in\\_Pakistan](https://www.researchgate.net/publication/325011498_Forced_Marriages_and_Inheritance_Deprivation_in_Pakistan).

<sup>4</sup> Rashid Javed and Mazhar Mughal, "Girls Not Brides: Evolution of Child Marriage in Pakistan," [www.econstor.eu](http://www.econstor.eu), 2020, <https://www.econstor.eu/handle/10419/226830>.

dying within the first year<sup>5,6</sup>. In addition, "babies born to adolescent mothers are more likely to have low birth weight, and thus suffer from malnutrition and underdevelopment. This often perpetuates the cycle of poverty and early marriage for another generation."<sup>7</sup> Child marriage has also reported to "limit women's economic empowerment and [the] education outcomes of their children (Sekhri and Debnath, 2014; Yount et al., 2018)."<sup>8</sup> Research in the United States shows that "a ten percent reduction in female child marriage could reduce a country's maternal mortality rate by 70 percent."<sup>9</sup>

This study critically examines the SCMRA and the SCMRR considering the factors that encourage or discourage practice of child marriage in Sindh, Pakistan. The structure of the paper is roughly dialectical. Starting by examining the arguments and factors that encourage child marriage; it moves on to examine arguments and factors that discourage the practice. It then moves on to dissect the mechanics of the SCMRA and the SCMRR. It is noted that no reported judgements appear in law journals yet, however, there are some judgements reported under its predecessor, the Child Marriage Restraint Act, 1929. These have been relied upon, at different intervals, in the present study. After this, the study briefly examines the possibilities for victims of child marriage, if the SCMRA and the SCMRR framed thereunder were implemented. Lastly, the study presents its key findings and recommendations.

### **1.1 Evolving Treatment of the "Child" and "Child Marriage" by the State**

Overtime, there has been a global decline in the prevalence and popularity of child marriage with an evolving reasoning for the normative and/or scientific claim that child marriage is wrong or detrimental,<sup>10</sup> supported by its impact on culture, society, and economy. The state's interest in regulating child marriage has also been incentivized by the changing economic and political environment.<sup>11</sup> This interest is also based on the evolution of State and society's understanding of 'childhood', and its most recent form.<sup>12</sup>

In pre-industrial times, children were treated like little or pre- adults who took part in the same work and play activities as grown-ups.<sup>13</sup> They were also not deemed to be sexually corruptible (and hence in need of protection) in the same manner as it is understood today.<sup>14</sup> It was between 1870 and 1890 that liberal democracies started to arrive at the idea of "children as innocents in need of protection from the harshness of the adult world".<sup>15</sup> This idea was popularized by an increasingly powerful since the advent of the industrial revolution

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<sup>5</sup> According to the International Women's Health Coalition, this risk is 60%. "International Women's Health Coalition," International Women's Health Coalition, 2019, <https://iwhc.org/resources/facts-child-marriage/>.

<sup>6</sup> Girls Not Brides, "Health - Girls Not Brides," Girls Not Brides, 2012, <https://www.girlsnotbrides.org/themes/health/>; WHO, "WHO | Child Marriages: 39 000 Every Day," Who.int, May 21, 2014, [https://doi.org/doi.org/entity/mediacentre/news/releases/2013/child\\_marriage\\_20130307/en/index.html](https://doi.org/doi.org/entity/mediacentre/news/releases/2013/child_marriage_20130307/en/index.html).

<sup>7</sup> Freccero, J. & Whiting. A. June 2018. *Toward an End to Child Marriage: Lessons from Research and Practice in Development and Humanitarian Sectors*. Berkeley, CA, United States, p.8. Human Rights Center, UC Berkeley School of Law & Save the Children. <https://www.law.berkeley.edu/wp-content/uploads/2018/08/Toward-an-End-to-Child-Marriage-Report-FINAL.pdf>

<sup>8</sup> Rashid Javed and Mazhar Mughal, "Girls Not Brides: Evolution of Child Marriage in Pakistan," *www.econstor.eu*, 2020, <https://www.econstor.eu/handle/10419/226830>.

<sup>9</sup> Chakraborty, Roshni. "Child, Not Bride: Child Marriage Among Syrian Refugees." *Harvard International Review* 40, no. 1 (2019): 20-21. Accessed January 9, 2021. doi:10.2307/26617388.

<sup>10</sup> Lindberg, Anna. "Child Marriage in Late Travancore: Religion, Modernity and Change." *Economic and Political Weekly* 49, no. 17 (2014): 79-87. Accessed January 9, 2021. <http://www.jstor.org/stable/24480123>.

<sup>11</sup> Foucault, Michel, *The History of Sexuality* (New York :Pantheon Books, 1978).

<sup>12</sup> Philippe Ariès, *Centuries of Childhood : A Social History of Family Life* (New York: Vintage Books, 1962).

<sup>13</sup> Ibid

<sup>14</sup> Carpenter, Belinda, Erin O'Brien, Sharon Hayes, and Jodi Death. "Harm, Responsibility, Age, and Consent." *New Criminal Law Review: An International and Interdisciplinary Journal* 17, no. 1 (2014): 23-54, 28. Accessed January 9, 2021. doi:10.1525/nclr.2014.17.1.23.

<sup>15</sup> Dorothy Scott and Shurlee Swain, *Confronting Cruelty : Historical Perspectives on Child Abuse*, p.71 (Carlton South, Victoria: Melbourne University Press, 2002).

in the mid 1700s and this middle class's "intensified emotional investment in the child and a fear of sexual corruption"<sup>16,17</sup>

*"By the nineteenth century, the separateness of childhood had become entrenched ... and increased parental authority was being encouraged within the family. Central to this new relationship was the denial of certain types of behavior between an adult and a child, with sexual contact specifically excluded. It is within this history of the "child as innocent" that the age of consent laws were passed through most parliaments in the Western world. As Finch identifies, these laws emerged as the direct result of a desire to demarcate the social age barriers at which a person could be considered and treated as a child, as well as demarcating a line between the sexual and nonsexual person, with the nonsexual child being "out of bounds" as a sexual partner"*<sup>18</sup>

In *The History of Sexuality*, Foucault notes that in an economic context where a healthy and able workforce was/is an imperative requirement for a country to prosper, and where the energy of this workforce needs to be directed at the pursuit of profit, not pleasure, the repression of sexuality and prohibition of certain sexual behaviours has formed an important tool of statecraft.<sup>19</sup> Moreover, for the State to have control over the workforce and regulate the private lives of citizens, it needs to (a) monitor and regulate citizens while they are still children, and (b) legitimize this control by providing safety and welfare to its citizens and their children. In the Western Political context, the liberal ideals of non-interference and minimum regulation were interrupted by the State's need to ensure the production of healthy, able and productive citizens; and thus, child protection programs and social welfare institutions had to be established. Practices like child marriage, or dangerous labour employment practices,<sup>20</sup> which would interfere with the production and upkeep of a healthy, well-ordered population, were prohibited by law.<sup>21</sup>

Similarly, in Pakistan, one can observe a move, albeit slow, towards regulation of lives of citizens through laws prohibiting child marriage and child labour, and those promoting compulsory education etc. The State of Pakistan had previously been tolerant of sharing its monopoly over violence and law making by allowing customary laws and practices to prevail and pronounce penal judgements, among other things. However, now more than ever, moving towards consolidating its power by reclaiming its monopoly over violence by establishing a more robust rule of law.<sup>22</sup> As a result, the state which had ignored or shown tacit support for violence and/or discrimination against women, children, minorities etc. is forced to take action against this violence and discrimination to legitimize its own claim to

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<sup>16</sup> Weeks, J. 1989. *Sex, Politics and Society: The Regulation of Sexuality since 1800*. 2<sup>nd</sup> Edition, P.48, Routledge

<sup>17</sup> Carpenter, Belinda, Erin O'Brien, Sharon Hayes, and Jodi Death. "Harm, Responsibility, Age, and Consent." *New Criminal Law Review: An International and Interdisciplinary Journal* 17, no. 1 (2014): 23-54, 28. Accessed December 9, 2021. doi:10.1525/nclr.2014.17.1.23.

<sup>18</sup> Ibid

<sup>19</sup> Foucault, Michel, *The History of Sexuality*, p. 4 & 5. (New York :Pantheon Books, 1978).

<sup>20</sup> Victoria Bates, "The Legacy of 1885: Girls and the Age of Sexual Consent," *History & Policy*, September 8, 2015, <http://www.historyandpolicy.org/policy-papers/papers/the-legacy-of-1885-girls-and-the-age-of-sexual-consent.>; The National Archives, "The National Archives - Homepage," The National Archives ([www.nationalarchives.gov.uk/](http://www.nationalarchives.gov.uk/)), accessed November 22, 2020, <https://www.nationalarchives.gov.uk/education/resources/1834-poor-law/#:~:text=The%20new%20Poor%20Law%20ensured.>; "Coal Mines," UK Parliament, 2019, <https://www.parliament.uk/about/living-heritage/transformingsociety/livinglearning/19thcentury/overview/coalmines/>.

<sup>21</sup> Michael Wyness, "The Responsible Parent and Networks of Support: A Case Study of School Engagement in a Challenging Environment," *British Educational Research Journal* 46, no. 1 (September 3, 2019): 161-76, <https://doi.org/10.1002/berj.3573>.

<sup>22</sup> Farah Zia and Nazish Brohi, "'Laws Are a Critical Starting Point' | Special Report | TheNews.Com.Pk," [www.thenews.com.pk](http://www.thenews.com.pk), November 27, 2016. Accessed November 10, 2020. <https://www.thenews.com.pk/tns/detail/562198-laws-critical-starting-point>.

statehood and establish its own writ by providing safety and welfare to its citizens and future citizens.<sup>23</sup>

Regardless of what the motivation to curb child marriages may be, persuasive consensus in global and local in the law and policy making circles has emerged, and it has been reiterated in the social-standard-setting echelons of Pakistani society that identify child marriage as a socially undesirable practice. It is clear that child marriage has far reaching effects on the health, psycho-social development, and social, economic, cultural, political and civil agency of those pushed or baited into child marriages and children who are produced as a result of these marriages. This has resulted over the years in a series of attempts to control or eliminate this practice through law and policy.

At present, most countries across the globe have legislated against child marriage and set minimum ages of marriage.<sup>24</sup> However, despite the global social, legal, and political will that led to the passing of these laws and the rules thereunder, child marriage continues across the world. WHO and United Nations Population Fund (UNFPA) estimate 39,000 child marriages being contracted daily globally<sup>25</sup>, with Pakistan having the 6<sup>th</sup> highest number of child brides in the world (1.9 million)<sup>26</sup> with 18% of girls being married before the age of 18 and at least 4% being married before the age of 15.<sup>27</sup>

Internationally, the present global terminology, adopted by the Office of the United Nations High Commissioner for Human Rights, articulates the issue of child marriage, as 'Child, Early and Forced Marriage' (CEFM).<sup>28</sup> It is defined as:

*"Child marriage, or early marriage, is any marriage where at least one of the parties is under 18 years of age. Forced marriages are marriages in which one and/or both parties have not personally expressed their full and free consent to the union. A child marriage is considered to be a form of forced marriage, given that one and/or both parties have not expressed full, free and informed consent."*<sup>29</sup>

International law, through UN Conventions<sup>30</sup> and various resolutions<sup>31</sup> calls for an end to child, early and forced marriages under the basis of the Universal Declaration of Human Rights (UDHR), which was adopted by the United Nations (UN) in 1948. Pakistan voted in favour of

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<sup>23</sup> Nazish Brohi, "Women, Violence and Jirgas: Consensus and Impunity in Pakistan," *National Commission on the Status of Women*, June 2017. Accessed November 10, 2020. <http://www.ncsw.gov.pk/previewpublication/63>.

<sup>24</sup> Girls Not Brides, "CHILD MARRIAGE AND THE LAW - Girls Not Brides," Girls Not Brides, 2017, <https://www.girlsnotbrides.org/child-marriage-law/#do-all-countries-have-a-minimum-age-of-marriage>.

<sup>25</sup> WHO, "WHO | Child Marriages: 39 000 Every Day," Who.int, May 21, 2014. Accessed November 10, 2020. <https://doi.org/10.1186/14752875-2013-307>.

<sup>26</sup> (DHS 2017)

<sup>27</sup> (UNICEF)

<sup>28</sup>United Nations General Assembly Resolution A/RES/68/148 Child, early and forced marriage, 30 January 2014. Accessed November 10, 2020. <https://undocs.org/en/A/RES/68/148>; "OHCHR | Child, Early and Forced Marriage, Including in Humanitarian Settings" Accessed November 10, 2020. [www.ohchr.org](http://www.ohchr.org), accessed November 9, 2020, [https://www.ohchr.org/en/issues/women/wrgs/pages/childmarriage.aspx#:~:text=Child%2C%20early%20and%20forced%20marriage%20\(CEFM\)%20is%20a%20human](https://www.ohchr.org/en/issues/women/wrgs/pages/childmarriage.aspx#:~:text=Child%2C%20early%20and%20forced%20marriage%20(CEFM)%20is%20a%20human).

<sup>29</sup> "OHCHR | Child, Early and Forced Marriage, Including in Humanitarian Settings," [www.ohchr.org](http://www.ohchr.org), accessed November 9,

2020, [https://www.ohchr.org/en/issues/women/wrgs/pages/childmarriage.aspx#:~:text=Child%2C%20early%20and%20forced%20marriage%20\(CEFM\)%20is%20a%20human](https://www.ohchr.org/en/issues/women/wrgs/pages/childmarriage.aspx#:~:text=Child%2C%20early%20and%20forced%20marriage%20(CEFM)%20is%20a%20human).

<sup>30</sup> United Nations Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 1962. Accessed November 10, 2020. <https://www.ohchr.org/en/professionalinterest/pages/minimumageformarriage.aspx>; United Nations Convention on the Rights of the Child, 1989. Accessed November 10, 2020. <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

<sup>31</sup> United Nations Resolutions 69/156 of 18 December 2014, 71/175, 68/148 of 30 January 2014, (and 68/146 of 4 February 2014). <https://www.un.org/en/ga/68/resolutions.shtml>

the adoption in the UNGA and was a prima facie party to the decision.<sup>32</sup> Article 16 of the UDHR states that:

*"1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. 2. Marriage shall be entered into only with the free and full consent of the intending spouses. 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."*

## 1.2 Law and Policy on Child Marriage in Pakistan

In the Indian Subcontinent, laws regulating and prohibiting child marriages have been in force since 1890. The first such law was passed in the Princely State of Travancore (modern day Kerala).<sup>33</sup> In colonial British India, the first law against child marriages, was passed in 1927. This was updated in 1929 and passed as the Child Marriage Restraint Act, 1929 (CMRA). This law was inherited by Pakistan, upon its independence and it remains in force in Pakistan, with or without significant amendments. This law, as enforced in Punjab, Balochistan, Khyber Pakhtunkhwa and Islamabad Capital Territory, states that the minimum age for marriage of a girl is 16 years whereas the minimum age for marriage for a boy is 18 years. In 2013, the province of Sindh adopted the Sindh Child Marriage Restraint Act, 2013 (SCMRA). This law set the minimum age of marriage as 18 years for both boys and girls. The Sindh Child Marriage Restraint Rules, 2016 (SCMRR) were framed under the parent Act in 2016 and provided the mechanisms through which the SCMRA would be implemented.

According to Sarah Zaman, an alarming 50% of the marriages in Pakistan are likely to have been contracted when at least one of the spouses was below the age of 18 years.<sup>34</sup> A stark consequence of early marriage is early pregnancy: 7% of pregnancies in Pakistan are of children below the age of 18. However, this is considered to be an estimate as only 42% of births are registered and only 36% of children have birth certificates<sup>35</sup>. The statistics also reveal a grim figure of maternal mortality of 178 per 100,000 in 2019.<sup>36</sup> In Sindh, girls in rural areas are more than twice as likely to be married before the age of 16 than girls in urban areas.<sup>37</sup>

Law and policy surrounding child marriage have not been able to provide a comprehensive and holistic response to the nuances of the different categories of child marriage in Pakistan. There have even been challenges in defining what constitutes child marriage.

Pakistan also ratified the UN Convention on the Rights of the Child (CRC), which identifies a child as a person below the age of 18 in Article 1 in 1990; and the United Nations (UN)

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<sup>32</sup> "International Bill of Human Rights: Universal Declaration of Human Rights" United Nations Digital Library System, 1948. Accessed November 10, 2020. <https://digitallibrary.un.org/record/670964?ln=en&p=Resolution+217%28III%29+A>.

<sup>33</sup> LINDBERG, ANNA. "Child Marriage in Late Travancore: Religion, Modernity and Change." *Economic and Political Weekly* 49, no. 17 (2014): 79-87. Accessed January 9, 2021. <http://www.jstor.org/stable/24480123>.

<sup>34</sup> Sarah Zaman, "Forced Marriages and Inheritance Deprivation in Pakistan" 11, Aurat Foundation, *Policy and Data Monitoring of Violence against Women in Pakistan*, October 2014. Accessed November 10, 2020. [https://www.researchgate.net/publication/325011498\\_Forced\\_Marriages\\_and\\_Inheritance\\_Deprivation\\_in\\_Pakistan](https://www.researchgate.net/publication/325011498_Forced_Marriages_and_Inheritance_Deprivation_in_Pakistan).

<sup>35</sup> (DHS 2017)

<sup>36</sup> Stan Bernstein et al., "State of World Population 2019: UNFINISHED BUSINESS: The Pursuit of Rights and Choices for All," UNFPA (New York, USA: UNFPA, 2019). Accessed November 10, 2020. [www.unfpa.org/sites/default/files/pub-pdf/UNFPA\\_PUB\\_2019\\_EN\\_State\\_of\\_World\\_Population.pdf](http://www.unfpa.org/sites/default/files/pub-pdf/UNFPA_PUB_2019_EN_State_of_World_Population.pdf).

<sup>37</sup> Ayesha Khan, "Child Protection System Mapping and Assessment Sindh" (Karachi: Collective for Social Science Research, 2013). Accessed November 10, 2020. [https://www.researchgate.net/publication/325950714\\_Sindh\\_Child\\_Protection\\_Mapping\\_and\\_Assessment](https://www.researchgate.net/publication/325950714_Sindh_Child_Protection_Mapping_and_Assessment).

Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) of 1979 in 1996,<sup>38</sup> which under Article 16 states:

*"the betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory."*<sup>39</sup>

However, despite the ratification and support of international law, local law in Pakistan has not fully integrated these commitments. For all jurisdictions other than Sindh, the minimum age for the marriage of a girl remains 16 years. Other than the province of Sindh, the CMRA 1929 is still in place and/or has been reenacted in provinces and territories others than Sindh. The CMRA, 1929 states in Section 2(a) states "child" means a person who, if a male, is under eighteen years of age, and if a female, is under sixteen years of age", and in Section 2 (b) that "child marriage" means a marriage to which either of the contracting party is a child".<sup>40</sup> On the other hand, where the SCMRA 2013 states that the minimum age of marriage for both men and women is 18 years. The SCMRA 2013, states in Section 2(d) "minor" means person of either sex who is under eighteen years of age".<sup>41</sup> Then, child Marriage is defined in the SCMRA 2013, as a marriage which is entered into at a time when at least one of the contracting parties is less than the age of majority, that is 18 years of age.<sup>42</sup> However, contrary to both these laws, i.e. CMRA 1929 and SCMRA 2013, many courts continue to use age of puberty as determinant of adulthood for purposes of marriage, as discussed below.<sup>43</sup>

The different laws governing marriages in different faiths are also incongruent vis a vis minimum age of marriage.<sup>44</sup> The Sindh Child Marriage Restraint Act, 2013 (SCMRA 2013) also does not include an overriding clause through which these differing ages can be reconciled. Hence, child marriage may also mean different things for different faiths.<sup>45</sup>

In addition to varying definitions of 'child marriage', laws in Pakistan do not account for and respond to: (a) the possibility of voluntary child marriage where the contracting parties are close to the age of majority- can a person under the age of majority consent to marriage with an adult? (b) the strength of social norms surrounding child marriage and the concurrent lack of social will to report child marriages to law enforcement agencies or justice systems? (c) economic reasons that support (or discourage) child marriages (d) whether the marriage itself will be void after it has been found to be a child marriage (at present it is only simply voidable)? (e) child marriages that are contracted to secure identification or citizenship

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<sup>38</sup>"UNTC," Un.org (UN, 2019), [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en).; Pakistan has also ratified the Convention of the International Labour Organization (ILO), C138, the Minimum Age Convention of 1973, which was adopted in furtherance of the terms set forth in this Article, the Minimum Age (Industry) Convention, 1919, the Minimum Age (Sea) Convention, 1920, the Minimum Age (Agriculture) Convention, 1921, the Minimum Age (Trimmers and Stokers) Convention, 1921, the Minimum Age (Non-Industrial Employment) Convention, 1932, the Minimum Age (Sea) Convention (Revised), 1936, the Minimum Age (Industry) Convention (Revised), 1937, the Minimum Age (Non-Industrial Employment) Convention (Revised), 1937, the Minimum Age (Fishermen) Convention, 1959, and the Minimum Age (Underground Work) Convention, 1965, to reiterate the need for a minimum age of employment. It has also ratified the (anti) Slavery Convention of 1926.

<sup>39</sup> "UNTC," Un.org (UN, 2019), Accessed November 10, 2020. [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en).

<sup>40</sup> CMRA, 1929

<sup>41</sup> SCMRA, 2013

<sup>42</sup> CMRA, 1929

<sup>43</sup> SCMRA, 2013, Section 2(a) & (b)

<sup>44</sup>Sarah Malkani, "Ending Impunity for Child Marriage in Pakistan: NORMATIVE AND IMPLEMENTATION GAPS," *Reproductiverights.Org* (New York, NY, USA: Center for Reproductive Rights, 2018), Accessed November 10, 2020.

[https://www.reproductiverights.org/sites/crr.civicaactions.net/files/documents/64785006\\_ending\\_impunity\\_for\\_child\\_marriage\\_pakistan\\_2018\\_print-edit-web.pdf](https://www.reproductiverights.org/sites/crr.civicaactions.net/files/documents/64785006_ending_impunity_for_child_marriage_pakistan_2018_print-edit-web.pdf).

<sup>45</sup> Ibid

documents or for fear of forced conversions and (f) whether the adult party to the marriage will be charged with pedophilia and/or rape?

Moreover, the legal framework is disconnected from, and has failed to acknowledge or address, communitarian and societal practices. While the national and provincial governments have begun formulating a law and policy response to the issue of child marriage, they have not taken on board the various emissaries of power other than the State (such as family patriarchs, village elders etc.) that support child marriage and that control the community and shape societal opinions, values and beliefs. That is, those emissaries of power that repress and prohibit unwanted non-permissive behaviours and expression of sexuality and bodily autonomy, sometimes on behalf of the State and sometimes in confrontation with the State. These emissaries have a stake in the issue of child marriage, for their own sakes and for the consolidation of their own power. In the restraint and regulation of child marriages, the inherent frictions between the state and these power brokers cause confrontation and non-adherence to the law for elimination of child marriage.

Creating further complexities and challenges to resolving child marriage are the intersections between “forced conversions” and “child marriage”. Forced conversions through child marriage are incidents that are regularly reported in Sindh.<sup>46</sup> While other religious affiliations also suffer from the menace of forced conversions, the Hindus of Sindh are particularly hard hit.<sup>47</sup> The general pattern followed in cases of forced conversion is that minor girls are seduced, induced or abducted, converted to Islam, and then committed to the wedlock of a Muslim man. This method of proselytization achieves two purposes. First, it terrorizes and marginalizes a minority religion which practically does not have equal recourse to law enforcement apparatuses and judicial remedies; and second, it prevents population growth in the minority religion by ensuring that any child now produced by their women is a Muslim.

In many of these cases, young girls (children) of an impressionable age are baited with ideas of love, of economic upward mobility, and of living the rest of their lives as first-class citizens instead of as second-class citizens (as minority religions’ citizens often have to live in Pakistan).<sup>48</sup> However, it is important to note that, regardless of whether the minor girl is forcibly kidnapped or encouraged to elope by an older man, it is still constituted as abduction.<sup>49</sup>

The situation where a child from a religious minority group leaves her home to marry a Muslim man is different from a ‘forced conversion’. That is, when it is simply a ‘child marriage’ contracted for love but where one of the spouses is below the age of 18. The analysis requires a nuanced understanding of the dynamics of power structures based on religion, economics, age with a focus on concepts of exploitation, grooming and true and voluntary consent.

One way to differentiate between voluntary inter religion marriages, conversions for love, and coercions, may be by examining the age gap between contracting parties themselves and the

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<sup>46</sup>Reuben Ackerman, “Forced Conversions & Forced Marriages In Sindh, Pakistan,” *Www.Birmingham.Ac.Uk* (Birmingham, UK: CIfORB, TheUniversity of Birmingham, 2018), Accessed January 10, 2021. [www.birmingham.ac.uk/Documents/college-artslaw/ptr/ciforb/Forced-Conversions-and-Forced-Marriages-in-Sindh.pdf](http://www.birmingham.ac.uk/Documents/college-artslaw/ptr/ciforb/Forced-Conversions-and-Forced-Marriages-in-Sindh.pdf); Sulema Jahangir, “Forced Conversions,” DAWN.COM, April 12, 2020, <https://www.dawn.com/news/1548550>; Shaikh Abdul Rasheed, “Sindh: A Hub of Forced Conversions,” Daily Times, April 1, 2020, Accessed January 10, 2021. <https://dailytimes.com.pk/587095/sindh-a-hub-of-forced-conversions>

<sup>47</sup> Reuben Ackerman, “Forced Conversions & Forced Marriages In Sindh, Pakistan,” *Www.Birmingham.Ac.Uk* (Birmingham, UK: CIfORB, TheUniversity of Birmingham, 2018), Accessed January 10, 2021. [www.birmingham.ac.uk/Documents/college-artslaw/ptr/ciforb/Forced-Conversions-and-Forced-Marriages-in-Sindh.pdf](http://www.birmingham.ac.uk/Documents/college-artslaw/ptr/ciforb/Forced-Conversions-and-Forced-Marriages-in-Sindh.pdf).

<sup>48</sup>Iftikhar H. Malik, “Report: Religious Minorities in Pakistan,” *Minority Rights Group International* (London, UK: Minority Rights Group International, 2002), <https://www.refworld.org/pdfid/469cbfc30.pdf>; Zeeshan Salahuddin, “Pakistan’s Minorities: Second Class Citizens,” Daily Times, March 23, 2017, Accessed January 10, 2021. <https://dailytimes.com.pk/21620/pakistans-minorities-second-class-citizens/>.

<sup>49</sup> Section 365B, PPC, 1860. See also, Section 361, 364A, 366A, PPC, 1860

difference between their ages and the age of majority (18 years) when they would have been competent to contract a marriage by law. For example, if both contracting parties are close in age, and one or both of the contracting parties are of the age of sexual consent (16 years),<sup>50</sup> then, the marriage is less likely to have been contracted for sinister reasons. However, it is not as simple as that. It would still be useful to look at the power differential between the two parties to a marriage. For example, recently, one *Nikkah Khuwan* was found to have solemnized the marriage of (at least) two Christian girls below the age of 18 years to adult Muslim men within the span of a few weeks, evidencing the emergence of concerning patterns.<sup>51</sup> In one case, where the groom and the child bride had filed a case against the parents of the child for harassing the married couple; where the girl was a Christian and was 13 years old and the groom was a Muslim and was 44 years old. Here the girl was ostensibly accepting and supporting her marriage and it was unclear whether she had initially been taken into the marriage by force or not. However, her parents pleaded that she was a school-going girl, “too young to know the difference between right and wrong”, that is, to give informed consent.<sup>52</sup> The Court eventually placed the girl in a privately run shelter for women but did not direct that she be reunited with her family.<sup>53</sup> In another case, a girl was abducted and forcibly taken in marriage— she continued to resist the marriage, even after it was solemnized. After her family managed to retrieve her, her father presumably succumbed to the pressure and agreed to ‘compromise’ and allow the girl to remain wedded to her abductee. However, the girl herself resisted this fate and sought to be released from the marriage. She received the support of her uncle to pursue the legal route to have her abductee penalized and her marriage terminated.<sup>54</sup>

Registration of marriages with the National Registration Database Authority (NADRA) is infrequent, across the board, among all religious affiliations and was not even possible for many faiths until recently.<sup>55</sup> Consequently, this means that the prevalence of child marriages cannot be monitored because marriages and births are not registered.<sup>56</sup>

The complexities relating to child marriage— whether it is understanding its different categories or appreciating the nuances of how, when and in what circumstances they occur, and even the cultural and communal challenges to child marriages—obscure the discussion on child marriages. The lack of data exacerbates the matter with little evidence based research to provide concrete understanding of gaps within administrative and justice systems. These will have to be approached in a nuanced and incremental manner for the practice to be effectively regulated in the long term.

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<sup>50</sup> The age of sexual consent is based on the provision of Section 375(v) of the Pakistan Penal Code, 1890, that when a woman below the age of 16 is said to have been raped, the accused cannot take the defense that she consented. That is, a girl below the age of 16 cannot legally have deemed to consent to sexual activity or intercourse.

<sup>51</sup> Agenzia Fides, “ASIA/PAKISTAN - Arrest Warrant for the Muslim Religious Who Celebrated the Islamic Wedding of Catholic Minor Arzoo Raja - Agenzia Fides,” [www.fides.org](http://www.fides.org), December 12, 2020, [http://www.fides.org/en/news/69019-ASIA\\_PAKISTAN\\_Arrest\\_warrant\\_for\\_the\\_Muslim\\_religious\\_who\\_celebrated\\_the\\_Islamic\\_wedding\\_of\\_Catholic\\_min\\_or\\_Arzoo\\_Raja](http://www.fides.org/en/news/69019-ASIA_PAKISTAN_Arrest_warrant_for_the_Muslim_religious_who_celebrated_the_Islamic_wedding_of_Catholic_min_or_Arzoo_Raja).; Mohammad Nafees, “PROTECTING PAKISTAN’S ‘OTHER’ DAUGHTERS,” DAWN.COM, December 27, 2020, <https://www.dawn.com/news/1598101>.

<sup>52</sup> Raja Masih (Father of Child Bride) participating in LAS Consultation on Child Early and Forced Marriage, 20<sup>th</sup> November 2020.

<sup>53</sup> Constitutional Petition No. D-5364 of 2020, before the Honourable High Court of Sindh.

<sup>54</sup> Hamza Ameer, “The Dark Reality of Forced Conversions in Pakistan,” South Asia Monitor, December 28, 2020, <https://southasiamonitor.org/pakistan/dark-reality-forced-conversions-pakistan#:~:text=Neha%20Pervaiz%2C%20a%20young%20girl>.

<sup>55</sup> Sarah Malkani, “Ending Impunity for Child Marriage in Pakistan: NORMATIVE AND IMPLEMENTATION GAPS,” 13-16, *Reproductiverights.Org* (New York, NY, USA: Center for Reproductive Rights, 2018), Accessed January 10, 2021. [https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/64785006\\_ending\\_impunity\\_for\\_child\\_marriage\\_pakistan\\_2018\\_print-edit-web.pdf](https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/64785006_ending_impunity_for_child_marriage_pakistan_2018_print-edit-web.pdf).

<sup>56</sup> “Child Marriage in Southern Asia: Context, Evidence and Policy Options for Action,” 18, *ICRW* (International Centre for Research on Women, UNFPA, Australian Aid, 2012), Accessed January 10, 2021. <https://www.icrw.org/wp-content/uploads/2016/10/CHILDMARRIAGE-F-13.pdf>.

### 1.3 Methodology

This study was conducted using a qualitative method of analysis over a period of 14 weeks (September-December 2020) and employed four key tools of research:

- (i) Semi-structured qualitative interviews with expert lawyers and victims of child marriages and forced conversions. These included: 2 lawyers who had taken child marriage cases and successfully fought them; 1 constitutional lawyer who was able to provide perspective on the constitutional background; 1 lawyer with expertise in areas of Gender and Child Rights<sup>57</sup>; 1 child victim of forced conversion and marriage; 3 relatives (parents, cousin) of child brides who had been abducted, converted to Islam and married; 3 women of Punjabi ethnicity from lower income households who had been married before the age of 16 (2 of these women had suffered pregnancy complications); 2 women of Bengali ethnicity who belonged to lower income households and did not possess identity cards and had been married by age 16; 2 Sindhi women who belonged to a low income fishing community and had been married by the age of 16.
- (ii) Two round table consultations (at the beginning and near the end of the research consolidation) on 28<sup>th</sup> October, 2020 and 20<sup>th</sup> November, 2020 respectively; each comprising participants, including religious leaders, experts, practitioners in the fields of law, advocacy, public policy, social and gender justice, child rights, drafting legislation, law enforcement, religion, and community organizing and community engagement officers. The list of participants are provided in the Annexure A.
- (iii) A consultation workshop with parliamentarians, belonging to various political parties and religious backgrounds, all hailing from Sindh on 3<sup>rd</sup> December 2020;
- (iv) Desk research including academic, policy and comprehensive case law research.

There is limited, if any, official data on child marriages. Although efforts were made, no data was received from the courts. The data received from the police for the year 2020 did not provide sufficient case details, and could not be subjected to a meaningful and/or detailed analysis for this report.

## 2 Child, Early and Forced Marriage: Understanding Childhood, Marriage and the Warrant to Regulate

### 2.1 Defining the 'Child'

Recent global history has seen the State (sovereign) take a more overtly parental role in modern nation states,<sup>58</sup> and exert more control over the bodies of its subjects/citizens.<sup>59</sup> The relationship between the family and the State has evolved with time; and it was particularly reoriented when the Industrial Revolutions spread across the western, and then the colonized world— and the dichotomy between the public and private domain was also reoriented concurrently.<sup>60</sup> Previously, “children were legally and politically subsumed within the family as dependents with parents representing their interests (Lewis, 2006). This has generated a bipartite relationship between parents and the state.” The public domain was governed by the State, and the private domain (that is, anything to do with the family and the home) was

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<sup>57</sup> Advocate Maliha Zia ,Associate Director of Legal Aid Society

<sup>58</sup>Wyness, Michael. "Children, Family and the State: Revisiting Public and Private Realms." *Sociology* 48, no. 1 (2014): 59-74, 60. Accessed January 10, 2021. <http://www.jstor.org/stable/24433266>.

<sup>59</sup>Foucault, Michel, *The History of Sexuality* (New York :Pantheon Books, 1978); Niraja Gopal Jayal, *Citizenship and Its Discontents an Indian History* (Cambridge, MA: Harvard University Press, 2013).

<sup>60</sup>Wyness, Michael. "Children, Family and the State: Revisiting Public and Private Realms." *Sociology* 48, no. 1 (2014): 59-74, 60. Accessed January 10, 2021. <http://www.jstor.org/stable/24433266>.

governed (absolutely) by the parents, particularly the male parent. However, over time the State assumed more responsibility and control over children —its future citizens— tensions emerged between the public and the private realms; “between the proprietorial and particular interests of parents, and the welfare state with general interests in the well-being of children as investments in the future”.<sup>61</sup> A feminist critique of family also emerged in the latter part of the 20<sup>th</sup> century and it contributed to the opening up of family by challenging the relationship between family and privacy wherein violence, abuse or discrimination in the home was no longer deemed to be a discussion beyond the public realm and there arose a cause for action.<sup>62</sup>

Previously, children and women were essentially property of the patriarch of the household. However, the State increasingly assumed responsibility in protecting the welfare of children and (albeit to a lesser extent) women. Because the State needed to identify the nature and economy of its intervention, this has led to an increasing interest in identifying and regulating the point that distinguishes adulthood from childhood, and thus led to the development of the concept of adolescence. This resulted in an examination of the “relation between consent and harm where a duty of care, responsibility, and authority is relevant, and the ways in which relations of authority in many jurisdictions increase the age for which harm is assumed and protection is required”.<sup>63</sup>

However, when the concept of childhood is explored in Pakistan, the very basic premise i.e., ‘who is a child?’ is a most contentious argument. There is no standard definition of a child in Pakistan,<sup>64</sup> rather, there are a series of contradictory laws, complicated further by the over-arching use of Islamic/Muhammadan law, which is interpreted differently by different scholars, and thus interpreted differently by different judges, sometimes in contradiction with constitutional principles and existing legal statutes.<sup>65</sup>

Chronologically, the age of majority i.e., the boundary of childhood (focusing on Federal and Sindh laws) has varied as follows.

◁ As per Muhammadan Law:

*"any person who has attained puberty is entitled to act in all matters affecting his or her status or his or her property. But that law has been materially altered by the Majority Act, and the only matters in which a Muhammadan is entitled to act on attaining the age of fifteen years are (1) marriage (2) dower and (3) divorce. In all other matters his majority continues until the completion at least of eighteen years.*

*"Islam has fixed no age-limit for puberty for it varies with the countries and with races due to the climate, hereditary, physical and social conditions. Thus, in cold regions, one attains puberty at a much later stage as compared to hot regions, where both male and female attain it at quite an early stage. The earliest age of puberty, with respect to a boy, is 12 years and with respect to a girl, it is 9 years. According to Islamic Law, the minority of a male or female terminates when he or she attains puberty. Puberty is presumed on the completion of the 15 years. Among the Hanfis and the Shias, puberty is presumed on the completion of the eighteenth year. Under Section 2 of the Majority Act, 1875, minority ceases on the completion of 18 years, with an exception in matters relating to marriage, dower, divorce and adoption. Thus, for marriage, the rule of Muhammadan Law must*

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<sup>61</sup>Ibid

<sup>62</sup> Ibid

<sup>63</sup>Carpenter, Belinda, Erin O'Brien, Sharon Hayes, and Jodi Death. "Harm, Responsibility, Age, and Consent." *New Criminal Law Review: An International and Interdisciplinary Journal* 17, no. 1 (2014): 23-54, 24-25. Accessed January 9, 2021. doi:10.1525/nclr.2014.17.1.23.

<sup>64</sup>Malik Tahir Iqbal and Ahmer Majee, "Critical Analysis of the Sindh Child Marriage Restraint Act – 2013," 7-8, *Irfpk.Org* (Pakistan: Legal Rights Forum, 2017), Accessed January 10, 2021. <https://irfpk.org/wp-content/uploads/2020/05/Critical-Analysis-of-the-Sindh-Child-Marriage-Restraint-Act-2013-Final.pdf>.

<sup>65</sup> Under Article 2 of the Constitution of the Islamic Republic of Pakistan 1973, all law must be in conformity with Islam, thereby allowing for Islamic interpretation of legal text to be conducted at the discretion of the judge.

*apply in this case, according to which any person who has attained puberty is entitled to act in the matter of marriage on attaining the age of 15 years.”*<sup>66</sup>

- ◁ The Majority Act 1875, states that the age of majority is 18 years; however, Section 3 of The Majority Act, 1875, states that minority may extended till 21 years of age; “every minor of whose person or property, or both a guardian, other than a guardian for a suit within the meaning of Order 32 of the First Schedule of the Code of Civil Procedure, 1908 (V of 1908) has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of eighteen years, and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age shall, notwithstanding anything contained in the Succession Act, 1925 (XXXIX of 1925) or in any other enactment, his majority when he shall have completed his age of twenty-one years and not before.”
- ◁ The Succession Act, 1925, states that the age of a majority is 21 years.<sup>67</sup>
- ◁ Under the Child Marriage Restraint Act 1929, in all provinces *except* Sindh, age of marriage is 18 for boys and 16 for girls. In Sindh, under the Sindh Child Marriage Restraint Act, 2013, age of marriage for both boys and girls is 18.
- ◁ The Factories Act 1934 (and the Factories Act 2015) sets that the minimum age of employment at 14 years, however, a child under the age of 18 needs to get health clearance for any employment in a factory.<sup>68</sup>
- ◁ Section 5 of the Sindh Children’s Act, 1955, defines a child as a person under the age of 16, however, Section 20 stipulates that “(3) Where a Court has taken action under subsection (1) in the case of a child suffering from an infectious or contagious disease, the Court before restoring the said child to his partner in marriage, if there is one, or to the guardian, as the case may be, shall, where it is satisfied that such action will be in the interest of the said child, call upon his partner in marriage or the guardian, as the case may be, to satisfy the Court by submitting to medical examination that such partner or guardian will not reinfect the child in respect of whom the order has been passed.”<sup>69</sup> This is a particularly striking provision because it presumes that a child, i.e. some under the age of 16, may have a partner in marriage.
- ◁ Section 2(c) of the Juvenile Smoking Ordinance 1959, states that a person under the age of 16 is a Juvenile, that is, not an adult.
- ◁ Under the Hudood Ordinance, 1979, criminal liability may be attached to a person who has attained puberty and hence adulthood. This age is deemed to be 18 years for a man and 16 years for a girl.<sup>70</sup>

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<sup>66</sup> Malik Tahir Iqbal and Ahmer Majee, “Critical Analysis of the Sindh Child Marriage Restraint Act – 2013,” 7-8, *Irfpk.Org* (Pakistan: Legal Rights Forum, 2017), Accessed January 10, 2021. <https://Irfpk.org/wp-content/uploads/2020/05/Critical-Analysis-of-the-Sindh-Child-Marriage-Restraint-Act-2013-Final.pdf>.

<sup>67</sup>Ibid

<sup>68</sup> Section 81-91, Sindh Factories Act, 2015; Employment of Children Act, 1991; Section 2(d) & 20, Sindh Shops and Commercial Establishment Act, 2015

<sup>69</sup> Section 5 & 20, Sindh Children’s Act, 1955

<sup>70</sup> Malik Tahir Iqbal and Ahmer Majee, “Critical Analysis of the Sindh Child Marriage Restraint Act – 2013,” 7-8, *Irfpk.Org* (Pakistan: Legal Rights Forum, 2017), Accessed January 10, 2021. <https://Irfpk.org/wp-content/uploads/2020/05/Critical-Analysis-of-the-Sindh-Child-Marriage-Restraint-Act-2013-Final.pdf>.

- < The Juvenile Justice System Act of 2018 also defines a child as someone under the age of 18 years but distinguishes a child above the age of 15 years such that they can be denied bail.<sup>71</sup>
- < The National Identity Card (CNIC), which is a pre-requisite for registering a valid marriage, is issued at the age of 18.<sup>72</sup>
- < A child under the age of 18 may not directly approach any courts as litigants. Therefore, presuming they did have access to justice and to courts, if a child in under the age of 18, they will not normally be able to directly file for a divorce, for protection against domestic violence, for the custody of their child and so forth.<sup>73</sup>

## 2.2 Understanding Marriage within the Pakistani Context

William Eskridge argues that "marriage is an institution that is constructed, not discovered by societies. Marriage has meant different things at different times."<sup>74</sup> Globally, marriage plays a central role in reproducing relations of power in the private realm, in maintaining order in society and in maintaining the status quo, as is.<sup>75</sup>

In South Asia, majority of marriages are arranged by family patriarchs and/or community elders. "In the patrilineal and patrilocal context of Pakistan, a woman's access to her home comes through relationships with men and shifts over the course of the life cycle, from her father's house then to her husband's (Ban, 1998; Ban, 2000; Mumtaz and Shaheed, 1987). As in other collectivist cultures, greater value is placed on obedience and fulfillment of duties and obligations than on the rights of individual family members (Stewart, Bond, Zaman, Dar and Anwar, 2000)."<sup>76</sup>

There is a great emphasis on marriage in Pakistan society. Marriage and parenthood are considered amongst the basic objectives of the Islamic socio-legal system.<sup>77</sup> Moreover, the State has still not developed the infrastructure to take responsibility or provide protection to children. There exist no child protection services, universal access to education or healthcare and no properly functional helplines, police cells for women and child protection. As a result, although it promulgates laws and otherwise claims theoretical control over the welfare of children, the State lacks the functional infrastructure and the political will to take active ownership and control over its future citizens, that is, its children.

This is coupled with and compounded by the fact that:

*"the feudal system in the society has also caused severe antipathy towards women. The famous proverb of such system Zan, Zar, Zameen (woman, money and land) as the source of all evil, does reflect utter disregard for women and also her commoditization...A society obsessed with female 'honour' men are entrusted with*

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<sup>71</sup> Section 6 (4) Juvenile Justice System Act 2018.

<sup>72</sup> Section 10, NADRA Ordinance, 2000; 7-8, Malik Tahir Iqbal, Critical Analysis of the Sindh Child Marriage Restraint Act – 2013,

<sup>73</sup> Order I, Civil Procedure Code, 1908

<sup>74</sup>Grossi, Renata. "Love and Marriage." In *Looking for Love in the Legal Discourse of Marriage*, 17-38. 17. Canberra, Australia: ANU Press, 2014. Accessed December 3, 2020. <http://www.jstor.org/stable/j.ctt13www3x.5>.

<sup>75</sup> Perumal, Devina Nadarajan. "Introduction: The Ties That Bind: Marriage - a Risky Business or Safe Place?" *Agenda: Empowering Women for Gender Equity* 25, no. 1 (87) (2011): 9-14. Accessed January 6, 2021. <http://www.jstor.org/stable/41321394>.

<sup>76</sup>Critelli, Filomena M. "Between Law and Custom: Women, Family Law and Marriage in Pakistan." *Journal of Comparative Family Studies* 43, no. 5 (2012): 673-93, 677. Accessed January 10, 2021. <http://www.jstor.org/stable/23267840>.

<sup>77</sup> Sanchita Bhattacharya, "STATUS OF WOMEN IN PAKISTAN," *J.R.S.P.* Vol. 51, No. 1 (June 2014): 179-211, Accessed January 10, 2021. <http://lcwu.edu.pk/ocd/cfiles/Pakistan%20Studies/Maj/Pak-St-205/statusofwomen.pdf>.

*safeguarding the family honour through their control over female members, specifically controlling the female body, in terms of both its sexuality and its reproductive ability. Notions of a girl's virginity and chastity are strongly linked to the honour and the status of a family or clan, thus, there is tremendous pressure to minimise, through early marriage, the risk of 'improper' sexual activity. Hence, when a woman's behaviour is seen to threaten the patriarchal order, it is her body that is punished with beatings, burnings, sexual abuse, and even murder in the name of honour (Noor, 2004: 15).<sup>78</sup>*

As an outcome of this, a key feature that characterizes Pakistani society is control and ownership of women and their bodies by men —legitimized and perpetuated through marriage contracts and gendered division of obligations in a marriage. Resultantly, girls and women in all social classes are groomed, in one way or the other, for marriage and motherhood. This leads to women's basic (self)worth lying in two primary things: women as sexual beings and/or as mothers. Their worth, thus lies in their bodies, which must be 'protected'; "controlling a girl's sexuality becomes even more imperative under a rigid caste system where exogamy brings dishonour and shame to the family and community."<sup>79</sup>

Control over deciding marriages allows the power brokers in a society or community to maintain and strengthen the status quo by reproducing patriarchal power relations, class structures, caste hierarchies and so forth. "Since 'marriage is essential for girls', their choices get restricted by such social values and ideals."<sup>80</sup> Children's, particularly the female child's, relationships to their families are commonly characterized by a proprietary overtone where the child, whether adult or minor, is the family's to give in marriage to whomever they decide. As a result, giving agency to young persons to decide their own marriage is perceived as a direct threat to the power and position of parents and of others who have traditionally held control over deciding the marriages for the next generation.

As a result of the anxieties and motivations described above, the lives of adolescents and young adults are under strict surveillance. This is particularly true for young girls who are commonly, and as far as possible, prevented from leaving the house without permission and/or a chaperone, whose education is often discontinued after they begin puberty and who are prevented from seeking employment and/or marketable skills so that they do not become independent decision makers, if the economic position of a family allows.

Early and forced marriage may frequently occur even if a person has passed the age of majority. This practice is strengthened and reinforced by economic dependence, strict constraints on permissive sexual and non-sexual behaviours (such as independent decision making, seeking permission before leaving the house, seeking employment etc.), mobility, access to education, reproductive health, notions of honor embedded in the female body and so forth. Therefore, for the purposes of this study, child marriage is understood as a subset of early and forced marriage.

This study also recognizes that a child may be forced into a marriage due do explicit force exerted by figures of authority bearing on the child's life (including parents, village elders, extended family) and implied force of social and cultural realities of the child exerted by various factors such as:

- ◁ lack of open communication channels between the child and figures of authority which preclude the possibility of refusing to enter the marriage;

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<sup>78</sup> Ibid

<sup>79</sup> Ghosh, Biswajit. "Child Marriage, Community, and Adolescent Girls: The Saliency of Tradition and Modernity in the Malda District of West Bengal." *Sociological Bulletin* 60, no. 2 (2011): 307-26, 313. Accessed January 10, 2021. <http://www.jstor.org/stable/23620922>.

<sup>80</sup> Ibid

- ◁ societal norms which reinforce the compulsion to (a) get married, (b) according to parental choice and (c) at a certain young age, especially when the child's peers are also getting married;
- ◁ and/or the implied force exerted by economic deprivation, statelessness, religious or ethnic marginalization, fear of sexual assault, lack of employment opportunity, lack of mobility and so forth.

In Pakistan, there is also an overwhelming tendency to marry within the family. According to reports, "50% of marriages occur between first and second cousins and this is even more common in villages and tribal territories than in urban areas (Siddiqui et al., 2006). It is believed that such marriages assure a degree of clan solidarity, marital stability, and familiarity with prospective partners in a strictly sex-segregated society (Qadeer, 2006). This system keeps property and wealth within family for upper and middle classes, but also alleviates the burden of the poor, since relatives are likely to be restrained in their demands for dowry."<sup>81</sup>

### 2.3 Full, Free and Informed Consent

Perhaps the biggest problem with child marriage is if, and when, a child can be deemed to have consented? At which age is a person capable of giving consent to a sexual relationship and/or an economic relationship and the social and cultural relationship that is implied in marriage? Can a person who is not competent to make a police report or file a court case for their own protection or for the custody of their child based solely because the person is less than 18 years of age, consent to marriage? Does the cultural context of a child determine whether they may be informed and competent to consent to marriage?

It is true that the age of sexual consent (or the age below which a child's consent will not be considered relevant to a charge of rape in Pakistan) is 16 years.<sup>82</sup> However, sexual relations do not have the immediate economic, social, psychological and health implications that marriage does. In any case, sexual relations, even when consensual, are likely to be discreet since there is negligible acceptability for sexual relations outside of wedlock in Pakistan (and hence in Sindh). Legally, Pakistani law recognizes a person under the age of 18 years in a number of limited capacities: as discussed above in Section 2.1.<sup>83</sup> In the Family Courts, children of 12 years or more are commonly asked to give their preference in matters of custody (this preference is given weightage by the Court but is not treated with finality), however, the court makes the final decision for a person under 18 years of age under its parental jurisdiction.<sup>84</sup> By law, compulsory education is required to be afforded to every child till the age of 16, after which they can choose to discontinue their education.<sup>85</sup> On the other hand, a person below the age of 18 does not have the same rights as a citizen as that of age 18 years or above. Before 18 years of age, a Pakistani cannot: vote,<sup>86</sup> enter into a contract, or directly file a court case (which requires a biometric identification based on the national identity card (CNIC) issued at the age of 18) such as a case for the dissolution of marriage, for protection against domestic violence, for maintenance, for child custody and so forth;<sup>87</sup>

<sup>81</sup>Critelli, Filomena M. "Between Law and Custom: Women, Family Law and Marriage in Pakistan." *Journal of Comparative Family Studies* 43, no. 5 (2012): 673-93, 677. Accessed January 10, 2021. <http://www.jstor.org/stable/23267840>.

<sup>82</sup> 375 (v), PPC, 1860

<sup>83</sup> Section 81-91, Sindh Factories Act, 2015; Employment of Children Act, 1991; Section 2(d) & 20, Sindh Shops and Commercial Establishment Act, 2015

<sup>84</sup> Section 17, Guardians & Wards Act, 1890

<sup>85</sup> Article 25A, Constitution of Pakistan, 1973; Section 3 & 8, The Sindh Right of Children to Free and Compulsory Education Act, 2013

<sup>86</sup> "ECP - Election Commission of Pakistan," [www.ecp.gov.pk](http://www.ecp.gov.pk) (Election Commission of Pakistan, 2018), Accessed January 10, 2021.

<sup>87</sup> Section 11, Contracts Act, 1872

and is ordinarily not allowed to make a police report without the presence of an adult. If a person under the age of 18 is not a full citizen and cannot be deemed capable of the above, then how can they be deemed capable of consenting to marriage, and potentially birthing and raising children?

A second, somewhat opposing question is, that if a person under the age of 18 is not being viewed as a child by their community, and when they have no reason to view herself as a child, and when she or he sees that peers in her age are being married off by their respective parents; then, if they falls in love or otherwise wants to contract a marriage, can they fully consent to her marriage? Should such consent be legally recognizable? Can a child consent to marriage after the age of sexual consent (16 years) or even before that? Can a child consent to marrying someone significantly older than themselves?

A third factor to consider is that, given the vast power differential between the elders and children, will a person be able to get all the necessary information and freely express consent or the lack thereof? This power differential is particularly stark between daughters and fathers and/or community elders making the marriage decisions. It appears that "one-way communication" characterizes the socialization of children. Both girls and boys are severely restrained from sharing their thoughts ideas or questions with their parents, may it be mothers and daughters or fathers and sons. Patriarchal and its affiliate socio-economic structures reinforce this power differential.<sup>88</sup> Therefore, it is unlikely that children, or even young adults, could even freely discuss their consent to marriage, let alone making sure that that consent is free, full and informed.

In order for consent to be full, free and informed, the consenting party must be fully able to abide by the idea and the reality of marriage; free from express or implied pressure or force; and informed about the alternatives to marriage. If a person under 18 years of age is legally competent to earn wages, emotionally capable of falling in love, physically capable of having sexual intercourse and capable (albeit with the strong possibility of medical complications) of conceiving and birthing a child, then why can they not contract marriage? The ages of entering and exiting adolescence differ from person to person.<sup>89</sup> So, at what point must or may a child be referred to as a person and not as a child and can this be universally identical? How does a child's inability to consent to marriage differ from that of an adolescent or that of an adult?<sup>90</sup> To what extent can the maturity of a person and their capability to make a decision about their marriage vary on an individual basis and to what extent can such variations be incorporated into law and policy? What normative claims underpin the claim that there is one hard and fast minimum age of marriage before which a person cannot consent to marriage? Can legal interventions be useful for regulating consent for marriage?

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<sup>88</sup> Ghosh, Biswajit. "Child Marriage, Community, and Adolescent Girls: The Salience of Tradition and Modernity in the Malda District of West Bengal." *Sociological Bulletin* 60, no. 2 (2011): 307-26, 313. Accessed December 10, 2021. <http://www.jstor.org/stable/23620922>.

<sup>89</sup> NHS UK, "Stages of Puberty: What Happens to Boys and Girls," [nhs.uk](https://www.nhs.uk/live-well/sexual-health/stages-of-puberty-what-happens-to-boys-and-girls/#:~:text=The%20average%20age%20for%20girls), April 26, 2018. Accessed December 10, 2021. <https://www.nhs.uk/live-well/sexual-health/stages-of-puberty-what-happens-to-boys-and-girls/#:~:text=The%20average%20age%20for%20girls>.

<sup>90</sup> "Between the fourteenth and eighteenth centuries, however, the conception of child as separate from adult took shape. "The category of childhood, in which a person was accorded different responsibilities, rights and social functions due to their age, gained acceptance in Western European society through the middle and upper classes." At this time, childhood did not bear any of the modern connotations of sexual innocence. ... "Children were assumed to be closer to the body, less inhibited, and thus unlikely to be corrupted by adult knowledge."...[this] romantic notion of the innocent child lost ground from the mid nineteenth century to a more scientific understanding of the child and childhood sexuality. Following Freud, a sexual instinct was identified as existing from birth, but it was positioned as dormant, unconscious, and latent. A child was innocent precisely because it had no sexual knowledge, yet at the same time children were perceived as being at constant risk" Towards the 20th century, "Children were perceived of as "powerless," "unknowing," and "unable to consent"; there was "a presumed lack of sexual knowledge" and "an inability to make or understand sexual decisions." Carpenter, Belinda, Erin O'Brien, Sharon Hayes, and Jodi Death. "Harm, Responsibility, Age, and Consent." *New Criminal Law Review: An International and Interdisciplinary Journal* 17, no. 1 (2014): 23-54, 29-30. Accessed December 9, 2020. doi:10.1525/nclr.2014.17.1.23.

Consent has two components: inward and outward, that is a “voluntary willingness” and its “communication to another person”.<sup>91</sup> Sexual consent alone is a complex and nuanced issue.<sup>92</sup> Consent to marriage is significantly more convoluted. The socialization processes of girls, women, boys and men do not strictly teach them to seek or give consent.<sup>93</sup> The perceived harm and victimization are locked into a gendered and heteronormative “sexual script” that assigns the role of victim, the demure sought after, the passive recipient, the subject-hood to the girl or woman and that of perpetrator, the aggressive pursuant and active donor, and the authority to the boy or man. At the outset, this script guides boys and girls through a performance of itself.<sup>94</sup> This performance blurs the giving and/or taking of consent since the active giving of consent runs counter to the script for the girl and the seeking of consent (being dependent on the giver of consent) runs counter to the script for the boy. This sexual script denies agency to the girl or woman.<sup>95</sup>

As described above, force or coercion for the marriage of a child can be expressed or implied; structural or direct. Express and direct force could come in the form of confinement, physical abuse, or aggressive command. When it is implied, force could take the form of closed or one way communication channels such that a person would not be able to refuse the marriage contract, using intimidation or social norms and notions such as honor, pride and guilt to convey to the person that they have no alternatives or by disallowing them to continue education, denying opportunity to work and making it clear that there are no alternatives available except for marriage.<sup>96</sup> They may also mean subjecting the girl or woman to neglect, emotional abuse, and apathy.<sup>97</sup> On the other hand, structural coercion into marriage could take several forms. It could be that the person being forced to marry has no access to a school or employment opportunity near her home, there is no access to reproductive or other healthcare where she lives, the person is made aware that the cost of their dowry will rise if marriage is delayed, that marriage is the only or easiest route to escaping statelessness, that marriage is the only route to escaping economic deprivation or religious marginalization, that marriage is a route to avoid sexual assault, that marriage is the only route to avoid being socially ostracised.<sup>98</sup>

To reiterate, sexual and social behaviors in Pakistan— particularly those of girls and women— are closely regulated by the family, community and by law.<sup>99</sup> Girls and women are often not allowed to leave their homes unchaperoned, are not allowed to pursue education or jobs before they are married and/or without the permission of the household patriarch. This aspect has been discussed further under the discussion on (im)permissive sexuality in Section 3.5.1 (ii). Therefore, in the same vein, for a girl child to get the requisite information, be fully informed about the implications and consequences of marriage and for her to give express

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<sup>91</sup>Humphreys, Terry. "Perceptions of Sexual Consent: The Impact of Relationship History and Gender." *The Journal of Sex Research* 44, no. 4 (2007): 307-15, 307. Accessed December 12, 2020. <http://www.jstor.org/stable/20620316>.

<sup>92</sup>Ibid

<sup>93</sup> Ibid

<sup>94</sup> Judith Butler. "Gender Trouble: Feminism and the subversion of Identity" 178 (1990)

<sup>95</sup> Carpenter, Belinda, Erin O'Brien, Sharon Hayes, and Jodi Death. "Harm, Responsibility, Age, and Consent." *New Criminal Law Review: An International and Interdisciplinary Journal* 17, no. 1 (2014): 23-54, 27. Accessed January 9, 2021. doi:10.1525/nclr.2014.17.1.23.

<sup>96</sup> Ghosh, Biswajit. "Child Marriage, Community, and Adolescent Girls: The Salience of Tradition and Modernity in the Malda District of West Bengal." *Sociological Bulletin* 60, no. 2 (2011): 307-26, 312-14. Accessed December 12, 2020. <http://www.jstor.org/stable/23620922>.; LAS Consultation on the Implementation of the Sindh Child Marriage Restraint Act, October 28, 2020, Legal Aid Society, Virtual Meeting. .

<sup>97</sup> LAS Consultation on the Implementation of the Sindh Child Marriage Restraint Act, October 28, 2020, Legal Aid Society, Virtual Meeting.

<sup>98</sup> Ibid

<sup>99</sup> Sarah Zaman and Maliha Zia, "How Much Rape Is Rape?," in *Disputed Legacies: The Pakistan Papers* (Chicago: UChicago Press- Seagull Books- Zuban Books-, 2019), 155–213.

consent would put her off script. Even for a boy to refuse a match would be off script. It would be aberrant. Therefore, free, full, and informed consent to a marriage is difficult to perceive as a norm in the existing Pakistani context.

### 3 The Drivers of Persistence: The “Reasoning” for Child Marriages

In Pakistan, there are several influences that favor and propel the practice of child marriage. These vary from religion to economics, to the inflated influence and authoritarian nature of family structures, to the stronghold of patriarchy and customary practices that are extreme manifestations of this authoritarian patriarchal structure, to the absence of the state, to the marginalization of religious minorities, to the (presumed) institutional security of marriage ever present danger of sexual assault, to the need to preserve the purity and chastity of the female body, to the commodification of the female body, to the subjugation of female labour. The aforesaid influences are examined below.

#### 3.1 Religion

The dominant religion in Pakistan is Islam, the school of Islamic thought followed by the majority of Muslims in Pakistan is the Hanafi Sunni School. Therefore, for the purposes of this paper, the use of the term ‘Islam’ will denote Hanafi Sunni Islam. Islamic law and jurisprudence are consolidated in Shari’a. “The core of Sharia Law is family law... Marriage, ...is not religious in the sense of constituting a sacrament, but rather in the sense of realising the essence of Islam. It is a civil contract legitimising sexual relations and procreation. According to the Quran, everyone who is physically, mentally, and financially capable of so doing has the obligation of entering into a marriage.”<sup>100</sup> According to the mainstream Hanafi understanding of Islamic jurisprudence, a girl is eligible, competent and encouraged to be married as soon as she gets her first period. At this point, she is presumed to have *passed* puberty (this assumes that puberty is (a) instantaneous, and (b) only comprises of starting menstruation— that is, as soon as a girl has begun menstruating, she has passed puberty). On the other hand, a boy is considered eligible and competent to marry once he can emit semen.<sup>101</sup>

There are three elements for a valid marriage in Islam: (a) marriageable age (as described above), (b) sound mind and (c) consent<sup>102</sup> from both parties contracting the marriage.<sup>103</sup> Although a woman who is competent to marry is allowed to independently contract her marriage, it is also simultaneously agreed (by all schools of Islamic thought) that the parent or guardian of a child may contract her marriage on her behalf before she reaches puberty, as long as such a marriage is not consummated before she reaches puberty.<sup>104</sup> Upon attaining the age of puberty, the parties to such a marriage may (conditionally) object to it and recuse themselves from the marriage, *if* the marriage hasn’t been consummated as yet.<sup>105</sup>

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<sup>100</sup> 39, Marriage Age in Islamic and Contemporary Muslim Family Laws. A Comparative Survey | by Andrea Büchler and Christina Schlatter

<sup>101</sup> Moreover, “In contrast to the Hanafi opinion, both the Shafi’i and the Hanbali school set the age of the legal capacity to marry at fifteen years for both sexes, while the Maliki school draws the line at seventeen years.<sup>25</sup> According to the Jafari [Shia] school, fifteen years for boys and nine years for girls is considered as the age of majority.<sup>26</sup> According to the Hanafi school there is a presumption that girls do not reach puberty until the age of nine and boys not until the age of twelve.” 40, Marriage Age in Islamic and Contemporary Muslim Family Laws. A Comparative Survey | by Andrea Büchler and Christina Schlatter

<sup>102</sup> The Shia and Hanafi strands of Islam allow a woman to independently contract marriage, however, the Hanbali, Shafi and Maliki schools require her to obtain the consent of her Guardian or Wali regardless of whether or not she is eligible and competent to marry. 40, Marriage Age in Islamic and Contemporary Muslim Family Laws. A Comparative Survey | by Andrea Büchler and Christina Schlatter

<sup>103</sup> Ibid

<sup>104</sup> 41, Ibid

<sup>105</sup> Ibid

Nevertheless, it is important to note here that “Islamic family-law structures are largely self-regulating, informal in nature, situation-specific and essentially flexible. More importantly, Islamic law is inherently suited to reform. Many efforts are being undertaken to re-read classical Islamic law and to liberate it from rigidities.” However, the present practical reality of Islamic Shari’a law is predominantly characterized by rigidity and limited hermeneutic freedom to creatively understand and reinterpret the Shari’a in response to contemporary needs.<sup>106</sup> However, it must also be stated that child or early marriage is “often more rooted in local customary traditions than in classical Islamic law, especially in rural areas.”<sup>107</sup>

The justice system of Pakistan has treaded cautiously and avoided direct confrontations with the dominant understanding of Islamic Shari’a law.<sup>108</sup> The courts, across Pakistan, have repeatedly relied on the silence of the law (CMRA 1929 and SCMRA 2013) as to the validity of an underage marriage and they have held that while those adults who entered, facilitated and solemnized the marriage may be held accountable, the marriage itself is deemed to be valid (although it is voidable through Khula or divorce proceedings).<sup>109</sup> That is, although many court judgements categorically recognize “the evil of child marriage” and even penalize the person responsible for solemnizing the marriage, they do not declare the marriage itself to be void.<sup>110</sup>

Before parting with the discussion on religion, it is important to note that the sword of religion is used, across Pakistani society, to encourage or justify child marriage or otherwise restrict freedoms of women and children by controlling the modesty, chaperoning, and protecting women. On the the hand, the statistics also show that a large proportion of sexual assault cases are cases of incest.<sup>111</sup> In the recent reports of child abuse “most abusers were acquaintances of their victims (3,964 in 2010 and 1,829 in 2016). The majority of incest cases were observed in 2012 (144 cases). The victim's home was a place of abuse in most incidents (306 incidents in 2010 and 594 in 2016).”<sup>112</sup> Perhaps this shows that the public and performative religiosity that is used as a method of control does not permeate the private realm with uniform girth or comparable rigor. According to Shari’a, the punishment for incest is the death penalty.<sup>113</sup> The fact that the most common site of child sexual abuse (and sexual assault, generally) is the home of the victim is neither a matter of public knowledge, discussion, or policing. The conviction rates for cases of rape, child sexual abuse and sexual assault remain approximately 2%.<sup>114</sup>

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<sup>106</sup> Ibid

<sup>107</sup> H. M. KAMALI, Law in Afghanistan. A Study of the Constitution, Matrimonial Law and the Judiciary 107 (1985); 44, Marriage Age in Islamic and Contemporary Muslim Family Laws. A Comparative Survey | by Andrea Büchler and Christina Schlatter

<sup>108</sup> P L D 2020 Lahore 811, Para 6, 8

<sup>109</sup> 1962 PLD Karachi 442; 1970 PLD Supreme Court 323; 2018 PCrLJN Lahore 175; 2006 YLR Lahore 2936; 1975 PLD Lahore 234; 2020 PLD Lahore 811;

<sup>110</sup> 2020 PLD Lahore 811; 2020 PLD Islamabad 28

<sup>111</sup> Sarah Zaman, “With an End in Sight- Incest in Pakistan: A Legal & Socio-cultural Analysis”,5-7, European Union, Rape Survivors Support Programme, April 2012, [https://www.researchgate.net/publication/325011457\\_With\\_an\\_End\\_in\\_Sight\\_-\\_Incest\\_in\\_Pakistan\\_-\\_A\\_Legal\\_Socio-cultural\\_Analysis](https://www.researchgate.net/publication/325011457_With_an_End_in_Sight_-_Incest_in_Pakistan_-_A_Legal_Socio-cultural_Analysis);

Correspondent, “2,846 Child Abuse Cases Reported in 2019,” thenews (The News International, April 22, 2020), <https://www.thenews.com.pk/print/647857-2-846-child-abuse-cases-reported-in-2019>.; Manizeh Bano and Habiba Salman, “Status of Child Sexual Abuse in Pakistan: Five Year Analysis 2007-2011,” SAHIL, 2012, <http://sahil.org/wp-content/uploads/2014/09/FIVE-YEAR-ANALYSIS-200-2011.pdf>.

<sup>112</sup>Muhammad Abdullah Avais, Hamida Narijo, and Mike Parker, “A Review of Child Sexual Abuse in Pakistan Based on Data from ‘Sahil’ Organization,” Journal of Islamabad Medical & Dental College, September 2020, <https://jimdc.org.pk/index.php/JIMDC/article/view/412>, 212, 216.

<sup>113</sup> Sarah Zaman, “With an End in Sight- Incest in Pakistan: A Legal & Socio-cultural Analysis”,4, European Union, Rape Survivors Support Programme, April 2012, [https://www.researchgate.net/publication/325011457\\_With\\_an\\_End\\_in\\_Sight\\_-\\_Incest\\_in\\_Pakistan\\_-\\_A\\_Legal\\_Socio-cultural\\_Analysis](https://www.researchgate.net/publication/325011457_With_an_End_in_Sight_-_Incest_in_Pakistan_-_A_Legal_Socio-cultural_Analysis)

<sup>114</sup> Web Desk, “Less than 3% Rapes in Pakistan Lead to Conviction,” Geo.tv: Latest News Breaking Pakistan, World, Live Videos (Geo News, September 15, 2020), <https://www.geo.tv/latest/308019-less-than-3-rapes-in-pakistan->

### 3.2 Economic Reasons

There are several economic factors that drive the practice of child marriage. The salient among these factors are discussed below.

Marriage in Pakistan, and South Asia in general, is often accompanied by demands of dowry, which is required to be paid by the family of the bride to the (family of the) groom. It is observed that the amount of dowry that is demanded from the bride's family increases as the age of the bride increases.<sup>115</sup> Thus, it is more economical to marry off a younger girl because lesser dowry is usually demanded for younger brides. Although the practice of the brides' parents giving dowry is legally regulated,<sup>116</sup> it is not regulated in practice. The custom of dowry is losing its previously unchallenged authority, it is still a prominent part of the social fabric. Families often start preparing dowry for their daughters since the time that they are born.

For families living in poverty, marrying off a daughter, allows parents to save the expense of supporting her and/or settling debts.<sup>117</sup> Alternatives such as education and employment are sparse, and the financial independence of women is not expected or normal, therefore, it is commonly assumed that if the girl is not married, she will be a financial liability.<sup>118</sup>

If a younger girl is married, she can provide her labour to the family she marries into, domestically, or on their agricultural land or the filial craft, or can otherwise earn for the family with more energy and for a longer period of time and is less likely to protest being overworked. She can also bear children for a longer period of time, albeit at the risk of her own health. Thus, more children can be produced and put to work.<sup>119</sup> "For the parents of a young boy, marriage is a tool to impel him to work and abjure all connections to childhood, as well as a source of pride for parents in the community".<sup>120</sup>

For families that have wealth to distribute, daughter are often denied their inheritance. Prevalent practices include *Haq Bakhsha*, where a girl is coaxed or coerced into forfeiting her inheritance; or marriage to the Quran, where a girl is married to the holy book and committed to a lifetime of religious learning; or simply marrying a girl off and physically removing her from the family household while she is too young to understand or claim her right in inheritance.<sup>121</sup> The younger a girl is married, the less likely she will be competent or able to claim her right in the inheritance.

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lead-to-

conviction#:~:text=In%20Pakistan%2C%20the%20conviction%20rate,War%20Against%20Rape%20(WAR).; Imrana Jalal Ellen Boccuzzi and John Rieger and Tracie Yang, "Compromising Justice: Pakistan's Low Conviction Rates for Rape," The Asia Foundation, October 2, 2018, <https://asiafoundation.org/2015/11/11/compromising-justice-pakistans-low-conviction-rates-for-rape/>.

<sup>115</sup>Critelli, Filomena M. "Between Law and Custom: Women, Family Law and Marriage in Pakistan." *Journal of Comparative Family Studies* 43, no. 5 (2012): 673-93, 673-677. Accessed January 10, 2021. <http://www.jstor.org/stable/23267840>.; Ghosh, Biswajit. "Child Marriage, Community, and Adolescent Girls: The Salience of Tradition and Modernity in the Malda District of West Bengal." *Sociological Bulletin* 60, no. 2 (2011): 307-26, 312-14. Accessed January 10, 2021. <http://www.jstor.org/stable/23620922>.

<sup>116</sup> Dowry and Bridal Gifts (Restriction) Act, 1976

<sup>117</sup> Sarah Zaman, "Forced Marriages and Inheritance Deprivation in Pakistan" 5, Aurat Foundation, *Policy and Data Monitoring of Violence against Women in Pakistan*, October 2014, [https://www.researchgate.net/publication/325011498\\_Forced\\_Marriages\\_and\\_Inheritance\\_Deprivation\\_in\\_Pakistan](https://www.researchgate.net/publication/325011498_Forced_Marriages_and_Inheritance_Deprivation_in_Pakistan).

<sup>118</sup> Ghosh, Biswajit. "Child Marriage, Community, and Adolescent Girls: The Salience of Tradition and Modernity in the Malda District of West Bengal." *Sociological Bulletin* 60, no. 2 (2011): 307-26, 312. Accessed January 10, 2021. <http://www.jstor.org/stable/23620922>.

<sup>119</sup> Sohail Warraich, Gender and Law Expert, participant in LAS Consultation on the Implementation of the Sindh Child Marriage Restraint Act, October 28, 2020, Legal Aid Society, Virtual Meeting.

<sup>120</sup> <https://blogs.lse.ac.uk/southasia/2017/07/13/stolen-childhoods-the-dilemma-of-child-marriage-in-rural-sindh/>

<sup>121</sup> Sarah Zaman, "Forced Marriages and Inheritance Deprivation in Pakistan" 3, Aurat Foundation, *Policy and Data Monitoring of Violence against Women in Pakistan*, October 2014. Accessed October 1, 2020.

There is a significant amount of anxiety in families that have more daughters, and there is an immense sense of urgency to marry off girls. Moreover, a girl child is often married off, regardless of her age or aspirations, if the parents find a match that offers socio-economic stability and/or upward mobility. Even if social or economic stability or upward mobility are not immediate factors, the sheer economic and power disparity between a party proposing marriage and the family of the girl, may make it impossible to deny a match. For example, if a landlord, no matter what his age, asks for the daughter of his tenant (serf/peasant) in marriage, no matter what her age, the power differential between the two families will prevent the weaker family from even considering refusing the proposal.

In addition to the factors discussed above, there are limited alternative life paths for women and their survival is believed to be hinged on marriage as there are very few avenues for mobility, higher education, vocational training, or formal employment available for women at large. These opportunities are even fewer and far between in rural areas.<sup>122</sup> So, the common perception is that women need to be married and to provide her labor to the domestic realm in order to have access to sustenance and living expenses. It is reported that women comprise 70% of informal labour force.<sup>123</sup> Because of this and because of the constraints imposed by families and perceived societal norms as to women pursuing formal employment and independent career growth, most women find themselves working in the informal economy, often with unfair terms of employment.<sup>124</sup> Resultantly, very few women will have the opportunity to be economically independent and will have to depend on their marriage for economic survival.

On the other hand, if a girl is 'too' educated it also becomes difficult for parents to find their daughters a matrimonial match. If a girl is more educated than the possible matrimonial matches available, the match is not considered suitable. It is even found that if a girl is educated, more dowry will be required.<sup>125</sup> On the other hand, if the groom is more educated, a higher dowry may be demanded from the bride's family.<sup>126</sup> As a result, girls are encouraged to drop out of school and marry as soon as a match becomes available. This leads to a cycle of marrying for economic stability but forfeiting any possible opportunities for economic independence.

### **3.3 Emergent Avenues of Exploitation of Women and Children**

In the past few decades, there has been an increase in women's access to knowledge, connectivity, virtual mobility and agency, particularly through the use of mobile phones and the internet.<sup>127</sup> However, this apparent progress is neither smooth, nor universal, nor linear

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[https://www.researchgate.net/publication/325011498\\_Forced\\_Marriages\\_and\\_Inheritance\\_Deprivation\\_in\\_Pakistan](https://www.researchgate.net/publication/325011498_Forced_Marriages_and_Inheritance_Deprivation_in_Pakistan)

<sup>122</sup> Ghosh, Biswajit. "Child Marriage, Community, and Adolescent Girls: The Salience of Tradition and Modernity in the Malda District of West Bengal." *Sociological Bulletin* 60, no. 2 (2011): 307-26, 314. Accessed January 10, 2021. <http://www.jstor.org/stable/23620922>.

<sup>123</sup> "According to the latest available labour force statistics in the Pakistan Labour Force Survey (2014-15), out of the total employed women in the non-agriculture sector, 74% are working in the informal sector and only 26% are working in the formal sector." Aliya H. Khan, "Women in the Informal Economy in Pakistan Chalking out Ways to Bridge the Disconnect between the Feminist Movement, the Workers' Organizations and Political Parties" (Friedrich-Ebert-Stiftung, 2017), <http://library.fes.de/pdf-files/bueros/pakistan/14909.pdf>, iv.

<sup>124</sup> "No Room to Bargain," Human Rights Watch, January 23, 2019. Accessed October 11, 2020. <https://www.hrw.org/report/2019/01/24/no-room-bargain/unfair-and-abusive-labor-practices-pakistan>.

<sup>125</sup> Ghosh, Biswajit. "Child Marriage, Community, and Adolescent Girls: The Salience of Tradition and Modernity in the Malda District of West Bengal." *Sociological Bulletin* 60, no. 2 (2011): 307-26, 314. Accessed January 10, 2021. <http://www.jstor.org/stable/23620922>.

<sup>126</sup> Ibid

<sup>127</sup> Abidi, Syed H, Muhammad Raees, and Syed Ali. "How Pakistan's Media Spreads the Message about Reproductive and Sexual Health." *BMJ: British Medical Journal* 350 (2015). Accessed November 19, 2020. <https://www.jstor.org/stable/26520393>; Critelli, Filomena M. "Between Law and Custom: Women, Family Law and

and nor does it mean that other aspects of women's place in society have not gotten worse.<sup>128</sup> For example, since the democratization and easy accessibility of the internet and mobile phones, while women, both rural and urban, have been able to access and exercise significantly more agency,<sup>129</sup> they have also become exposed to newer forms of sexual exploitation, harassment and fraud.<sup>130</sup> Through these electronic mediums, many underage girls have been reported to have been victims of sexual exploitation, assault and even baited into marriages based on fraud and deception that have led them into violent and dangerous situations, including sex trafficking or prostitution rings.<sup>131</sup>

### 3.4 Absence of Law: Patriarchy & (D)evolving Customary Practices

It also appears that customary practices related to marriage in Pakistan have been evolving in parallel with the role and station of women in society being degraded further. Sarah Zaman uses the example of *Swara* to explain this:

*"Overtime, some customary practices in Pakistan have become progressively sinister in terms of repercussions for women and impunity. For instance, the customs of Swara, or compensation marriage has taken on a very different form in present day from what it used to be...the custom of swara used to involve women of a household dressing up in black and visiting the family in which someone has been killed by someone amongst their own family. Usually, the victim's family would appreciate the gesture, accept their apology and send the women back, sometimes with gifts to the offending family. Minallah holds that the custom has been corrupted over time due to women's lowered position in society, where women are relentlessly sold or given away as compensation to the family whose member has been killed in order to settle a dispute."*<sup>132</sup>

There are several other customary practices that have either gotten worse or have not evolved with time at all. Some of these are described as follows. *Swara* also has sister customs— *Vani* and *Badl ul Sulh*; which involve forcibly marrying off girls in order to punish the male members of the family for their crimes or indiscretions, and to settle disputes.<sup>133</sup> Daughters are also generally used to settle debts. Similarly, in the practice of *Pait Likh*i, the marital fate of a child is sealed while they are still in the womb (*pait*: stomach) of the mother. In the practice of *Vatta Satta* or *Addo Baddo* two families exchange daughters and sons and take them as daughters in law and sons in law respectively; often times these marriages seem to be

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Marriage in Pakistan." *Journal of Comparative Family Studies* 43, no. 5 (2012): 673-93. Accessed January 10, 2021. <http://www.jstor.org/stable/23267840>.

<sup>128</sup> <https://www.thenews.com.pk/tns/detail/562198-laws-critical-starting-point>

<sup>129</sup> Critelli, Filomena M. "Between Law and Custom: Women, Family Law and Marriage in Pakistan." *Journal of Comparative Family Studies* 43, no. 5 (2012): 673-93. Accessed January 10, 2021. <http://www.jstor.org/stable/23267840>.

<sup>130</sup> DRM, "DRF Cyber Harassment Helpline Annual Report," Digital Rights Monitor, December 21, 2017, <http://www.digitalrightsmonitor.pk/1106-2/>; Barker, Kim, and Olga Jurasz. "Online Misogyny: A Challenge for Digital Feminism" ?" *Journal of International Affairs* 72, no. 2 (2019): 95-114. Accessed November 19, 2020. <https://www.jstor.org/stable/26760834>.

<sup>131</sup> Felmlee, Diane, and Robert Faris. "Toxic Ties: Networks of Friendship, Dating, and Cyber Victimization." *Social Psychology Quarterly* 79, no. 3 (2016): 243-62. Accessed November 19, 2020. <http://www.jstor.org/stable/44078245>; <http://www.digitalrightsmonitor.pk/1106-2/>; Fairbairn, Jordan. "Rape Threats and Revenge Porn: Defining Sexual Violence in the Digital Age." In *EGirls, ECitizens: Putting Technology, Theory and Policy into Dialogue with Girls' and Young Women's Voices*, edited by Bailey Jane and Steeves Valerie, 229-52. University of Ottawa Press, 2015. Accessed November 19, 2020. <http://www.jstor.org/stable/j.ctt15nmj7f.13>.

<sup>132</sup> Sarah Zaman, "Forced Marriages and Inheritance Deprivation in Pakistan" 5, Aurat Foundation, *Policy and Data Monitoring of Violence against Women in Pakistan*, October 2014, [https://www.researchgate.net/publication/325011498\\_Forced\\_Marriages\\_and\\_Inheritance\\_Deprivation\\_in\\_Pakistan](https://www.researchgate.net/publication/325011498_Forced_Marriages_and_Inheritance_Deprivation_in_Pakistan).

<sup>133</sup> Sarah Zaman, Gender and Child Rights Expert, participant in LAS Consultation on the Implementation of the Sindh Child Marriage Restraint Act, October 28, 2020, Legal Aid Society, Virtual Meeting.

governed by the motivation to secure a marital match for a daughter, to secure reciprocal labour for the household or farm or family vocation, or to secure the balance of power wherein if the daughter of one family is mistreated or given divorce, then the daughter of the corresponding family will also be given divorce or mistreated.<sup>134</sup> While data is limited, there is no evidence to suggest a substantial decline in this practice.<sup>135</sup>

The above-described customary practices and their many variants are often sanctioned, overseen and/or facilitated by village elders, *Jirgas*, *Panchayats*, *Faislos* that function as quasi courts or arbitrators.<sup>136</sup> These village leaders, *Jirgas*, *Panchayats* etc. remain predominantly animated by the conservative Islamic interpretations and outdated or regressive customs. Many have been reported to arrange marriages between toddler girls and geriatric men.<sup>137</sup> Overall, it remains the case that the girls, whose fate is being decided, have very little to do with the decision of their marriage. In fact, this report will shortly discuss the ways in which the child marriage law is used to further stifle women's agency with respect to the decision of marriage, whilst remaining unable to control the rampant pedophilia that is fueled by the normalization of child marriage.

In her recent report for the National Commission on the Status of Women,<sup>138</sup> Nazish Brohi notes that in a bid to consolidate its power, the State has made a concerted effort to diminish the power of *Jirgas* and *Panchayats*. She reports that, in some instances, entire *Jirgas* have been arrested where they made decrees that violated the laws made for the protection of women and undermined the human dignity of women. That noted, it is important to remember that such interventions, by the State machinery, are sporadic and inconsistent. Although it is not any part of the justice system of the country "the *jirga* assembly and arbitration on women's rights cases per se remains legal" insofar as it may be extra-constitutional but it is not illegal.<sup>139</sup>

In addition to these practices, norms and societal pressures, women and children are particularly disadvantaged in being able to access the justice system and seek judicial

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<sup>134</sup> Sohail Warraich, Gender and Law Expert, participant in LAS Consultation on the Implementation of the Sindh Child Marriage Restraint Act, October 28, 2020, Legal Aid Society, Virtual Meeting.

<sup>135</sup> <https://blogs.lse.ac.uk/southasia/2017/07/13/stolen-childhoods-the-dilemma-of-child-marriage-in-rural-sindh/>

<sup>136</sup> "The institution of *jirga* has increasingly become the locus of misogynist practices such as child marriages and the barter of women for conflict resolution. Since *jirgas* have the veneer of consensus because they are collective albeit all male elite decisions, they construct a social legitimacy around anti-women practices." 1, Nazish Brohi, Women, Violence and *Jirgas* Review study for the National Commission on Status of Women

<sup>137</sup> Hanif Samoon, "Police Arrest Culprits after 5-Year-Old Girl Married to 22-Year-Old Man near Shikarpur," DAWN.COM, July 22, 2017, <https://www.dawn.com/news/1346935/police-arrest-culprits-after-5-year-old-girl-married-to-22-year-old-man-near-shikarpur.>; Hanif Samoon, "Badin Police Foil Marriage of Minor Girl with 40-Year-Old Man," DAWN.COM, November 12, 2017, <https://www.dawn.com/news/1370060.>; AFP, "Bartering Innocence for Honor," [www.newsweekpakistan.com](http://www.newsweekpakistan.com), February 12, 2014, accessed November 23, 2020. <https://www.newsweekpakistan.com/bartering-innocence-for-honor/>; Webdesk, "26 Girls Held Hostage to Settle Loan Dispute Recovered in Karachi," The Express Tribune, November 26, 2014, <https://tribune.com.pk/story/797406/police-recover-26-young-girls-from-house-in-karachi#.VHbVfOzbiBU.facebook%20.>; "In 2014, eleven-year-old Amna was married to a man three times her age as compensation for her uncle having raped a girl in Grilagan in northwest Pakistan. Amna was married off to the brother of the girl who had been raped. She was one of the two girls from the rapist's family given to the aggrieved family through a *jirga* decision. The other girl, Zulhaj, spoke to the media saying she had accepted her fate. In 2013, Rubina, a 12-year-old girl appealed to the chief justice of Pakistan's Supreme Court to provide her safety since she was being forced by a *jirga* to marry an older man in Doong Darra in Upper Dir district." "In 2006, five minor girls were to be handed as compensation to the rival party in Kashmore, Sindh. The decision was made with the connivance of a parliamentarian and the District Nazim. Both victims were rescued by the suo motu action of the Supreme Court of Pakistan." Nazish Brohi, "Women, Violence and *Jirgas*: Consensus and Impunity in Pakistan," 5-7, *National Commission on the Status of Women*, June 2017, accessed November 1, 2020. <http://www.ncsw.gov.pk/previewpublication/63>.

<sup>138</sup> Nazish Brohi, "Women, Violence and *Jirgas*: Consensus and Impunity in Pakistan," 8, 20, *National Commission on the Status of Women*, June 2017, accessed November 1, 2020. <http://www.ncsw.gov.pk/previewpublication/63>.

<sup>139</sup> Ibid

remedies against the harm incurred due to child marriage and/or forced marriage, or otherwise in any aspect of their lives.<sup>140</sup>

### **3.5 Child Marriage as Protection: Against Sexual Assault, Religious Marginalization and/or Statelessness**

Marriage is an extremely powerful social institution— particularly, in Pakistan. And it is accessible to (almost) all socio-economic classes of society. The foregoing sections show that marriage is both monetized and weaponised. The following section will discuss how marriage can be used as a shield against society and is often used as a “weapon of the weak”<sup>141</sup>.

The relationship between marriage and power is not linear or consistent. What may be one actor’s weapon is another one’s shield and another’s shackle. The poor Hindu farmer in rural Sindh or the stateless Bengali fisherman may find that marriage offers his daughter protection against the various state and non-state aggressors that threaten their daily life or perpetuate the conditions of their daily life. On the other hand, if their daughter expresses an interest in marrying someone or engaging in a romantic relationship of her own choice, the farmer or the fisherman will likely march forward with the sword of marriage and force her to marry someone they choose. Yet on the other hand, the daughter might seek protection, from forced marriage, by eloping and contracting a marriage as soon as possible before someone else can force their will on her. In all these instances, power is transmuted and transformed according to the situation: the farmer or the fisherman against economic realities, the Hindu and the stateless against state and societal discrimination and the daughters against fathers and family or community structures.

#### **3.5.1 Regulating Sex: Protection Against Sexual Assault; Prevention of Impermissible Sexual Behaviour; and Maintaining the Status Quo**

##### **(i) Sexual Assault**

The frequency of sexual crimes has been on the rise,<sup>142</sup> whether due to increased incidence or increased reporting. The numerical rise and/or the rise in the awareness of sexual crimes; the social ‘requirement’ of chastity of a girl; and the fact that a girl *loses value* as a bride if she is not a virgin and/or if she has a known sexual past, regardless of whether such a past was consensual or she was raped or assaulted<sup>143</sup> has a massive impact on parents of girls who fear for the protection and security of their daughters’ value, particularly those parents whose social and economic position is weak and cannot provide other forms of protection. Parents frequently believe marriage is a form of ‘protection’ for their daughters and try to marry off their daughters, as early as possible — lest they be violated.<sup>144</sup> Any risk of sexual violation of a girl would ruin her chances of getting married which would have social implications for the girl and her parents, such as victim shaming, social boycott etc. and siblings’ marriage prospects. It would also have economic implications, such as increased

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<sup>140</sup>Shazia Saleem and Khadija Ali, “The Justice Prelude: A Socio-Legal Perspective on Women’s Access to Justice,” ed. Meher Noshirwani, *Aurat Foundation & SPO*, February 2017, chrome-extension://oehttps://spopk.org/wp-content/uploads/2020/06/women\_access\_to\_justice.pdf.; Correspondent, “Gender Equality: Calling for Easing Women’s Access to Justice in Sindh,” *The Express Tribune*, August 11, 2016. Accessed November 21, 2020. <https://tribune.com.pk/story/1160446/gender-equality-calling-easing-womens-access-justice-sindh>.

<sup>141</sup> Scott, James C. *Weapons of the Weak: Everyday Forms of Peasant Resistance*. Yale University Press, 1985. Accessed January 12, 2021. <http://www.jstor.org/stable/j.ctt1nq836>.

<sup>142</sup> Maria Amir, “In Pakistan, Rape Culture Is Not Only Systemic, It Is Reinforced at Every Level,” *DAWN.COM*, September 16, 2020, <https://www.dawn.com/news/1580011>.

<sup>143</sup> Karachi Correspondent, “Pakistan’s Abandoned Daughters,” *The Hindu*, August 5, 2017, sec. International, <https://www.thehindu.com/news/international/pakistans-abandoned-daughters/article19435686.ece>.

<sup>144</sup> Shah Nawaz Jiskani, “Stolen Childhoods: The Dilemma of Child Marriage in Rural Sindh,” *South Asia@LSE* (London School of Economics & Political Sciences, July 13, 2017), <https://blogs.lse.ac.uk/southasia/2017/07/13/stolen-childhoods-the-dilemma-of-child-marriage-in-rural-sindh/>.

dowry and/or upkeep of an unmarried daughter. Multiple layers of disadvantage may force the parents of a child into 'protecting' her (and themselves) by marrying her as early as possible. For example, daughters of single mothers and/or economically deprived households and/or of castes and stations socially perceived to be lowly, suffer financial vulnerability, no social protection, no state protection and constant sexual threats that are aggravated in the absence of or weakness of the man of the family.

## **(ii) Permissive Sexuality**

There is a belief that the earlier a girl, or even a boy, is married off, the less likely they would be to engage in any "impermissible" sexual activity which may upset the existing status quo. In fact, most of the cases of child marriage that are reported are elopements or cases where either or both parties have contracted a marriage against the will and/or without the consent of the parents.<sup>145</sup>

When adolescent persons experience an emotional and sexual awakening, even if it is at an age of minority, and they see that their peers (of their own or younger ages) are being married off by their respective parents, they are unlikely to view themselves as children who are not competent to marry. Given that, if they believe their parents will punish and/or prohibit them for their choice of partner— eloping and marrying becomes the only means to exercise that choice of a romantic partner. Since there is no real space, in Pakistani or Sindhi society, for any romantic dalliance outside of marriage; and there is a strong likelihood that a person will be married off by the parents around that very age, these adolescent children often see eloping or running away as their only option. It is important to note that this lack of communication channels with the parents, family or community and the lack of alternatives to eloping means that adolescent children are very likely to endanger themselves by putting themselves in harm's way. If their chosen romantic partner is an adult and/or they don't have the resources and/or the romantic partner has criminal intentions then these adolescent children open themselves up to the possibility of being hurt, hungry, homeless, abused, assaulted, trafficked and/or forcibly converted from their faith.

These children are considered to be 'transgressors' of social norms, who by choosing their own partners and by eloping, are bringing 'dishonour' to their families and communities. Often, they are in danger of repercussions from their parents. Even if the parents themselves refrain from punishing them, the immediate community would not refrain from ostracizing and punishing— not just the transgressors but also their families. If the parents/family does not make any attempt to retrieve the person who has eloped and/or do not punish them, then the parents/family open themselves up to the possibility of being penalized by the community because the community views such as a threat to its norms and hence to its own power and ownership over their offspring.

When they elope or marry without consent, 'transgressors' open themselves up to possible police complaints and court cases filed by their parents alleging abduction and/or child marriage.<sup>146</sup> Most of the cases reported for child marriage are cases where the child has decided to marry according to their own choice; almost no cases of *forced* child marriage have been reported in Pakistan; and Sindh is no different.<sup>147</sup> This is partially because key concepts such as 'consent' are often not part of the mainstream discourse on child marriage, resulting

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<sup>145</sup> Khadila Ali, Gender Expert and Advocate High Court, participant in LAS Consultation on the Implementation of the Sindh Child Marriage Restraint Act, October 28, 2020, Legal Aid Society, Virtual Meeting.

<sup>146</sup> Khadija Ali (Gender Expert and Advocate High Court), Amna Latif (Director Communications, Aahung) and Sarah Zaman (Gender and Child Rights Expert), participants in LAS Consultation on the Implementation of the Sindh Child Marriage Restraint Act, October 28, 2020, Legal Aid Society, Virtual Meeting.

<sup>147</sup> All the available case law points in this direction.

in the absence of language and narrative that is able to discuss how this results in violation of the child's welfare.

Ironically, parents and communities try to use or manipulate state machinery and law which was meant to protect children, for retrieving and punishing them according to the customs of the community. This could mean torture, forced marriage, or honour killing. Punishment could also mean discontinued school education, confinement in home, social isolation, and emotional or physical abuse.<sup>148</sup> While in some cases lesser punishments have been used, honour killing remains a prevalent. In Sindh, this practice is known as *karo kari*, in which *karo* denotes the sinning man and *kari* denotes the sinning woman who are alleged to have committed sexual transgressions. The custom of *karo kari* does not discriminate between adults or adolescents and children.

This is a major dilemma faced by the justice system— in child marriage cases when the child has eloped or married by their choice; should the Court extract child from the marriage and should they send her to her parents or community where there is almost a confirmed likelihood of some form of punishment?<sup>149</sup> To justify and validate these marriages, Courts and young adolescents have both been able to use the Islamic provision as to marriage being permissible as soon as a child hits puberty. However, this is a slippery slope at best.<sup>150</sup>

The forgoing discussion reflects two defining issues that characterize the problem of child marriage: (i) subversion of the justice system and (ii) proprietary ownership of children.

### **(iii) Maintaining the Status Quo**

There is a palpable fear of women's/girls' independence that animates Pakistani society (and this fear frequently penetrates the Courtroom and the police station).<sup>151</sup> It is believed to be necessary and beneficial, across socio-economic strata, to marry a girl young, before she develops a sense of herself, of her opinions and preferences and before she asserts her independence. For the same reason, girls are discouraged from seeking advanced education or formal employment, because once they can financially support themselves, they are less likely to be dependent, submissive, dutiful wives, daughters and daughters-in-law. Such women may delay childbirth or may want to limit the number of children they have. Such women may not be willing to put up with physical violence, emotional and psychological abuse, and with restrictions on their mobility, opinion, or expression. Similar fears and the motivation to maintain status quo also encourage parents to marry off their sons young. The younger a child is married, the less likely he or she will be to disturb existing status quo; and more likely he or she will be to be molded as per the wishes of authority figures.<sup>152</sup>

### **3.5.2 Protection Against Forced Conversion and/or Religious Marginalization**

Minority communities are often encouraged to marry their girls off early, to a match from within their religious community to prevent their children, particularly their (virgin) daughters from being abducted, assaulted, abused and/or proselytized. This motivation for child marriage is further aggravated by minority religious communities' lack of access to justice. The state apparatus is both unable and unwilling to protect their daughters from rape, sexual

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<sup>148</sup> Sarah Zaman, Gender and Child Rights Expert, participant in LAS Consultation on the Implementation of the Sindh Child Marriage Restraint Act, October 28, 2020, Legal Aid Society, Virtual Meeting.

<sup>149</sup> Maliha Zia, Associate Director, Legal Aid Society, Key Informant Interview, 11<sup>th</sup> November, 2020, Karachi

<sup>150</sup> This will be discussed in detail in Section 7.

<sup>151</sup> Sarah Zaman and Maliha Zia, "How Much Rape Is Rape?," in *Disputed Legacies: The Pakistan Papers* (Chicago: UChicago Press- Seagull Books- Zuban Books-, 2019), 155–213, 160-161.

<sup>152</sup> LAS Consultation on the Implementation of the Sindh Child Marriage Restraint Act, 28<sup>th</sup> October, 2020, Legal Aid Society, Virtual Meeting.

assault and/or forced conversion.<sup>153</sup> It is also important to note that the practice of child marriage may be adopted by religious minorities "as a means of "cultural, economic, and societal preservation and autonomy" in the face of systematic discrimination".<sup>154</sup>

On the other hand, in many (minority) religious communities, child marriage is used to protect the status quo; that is, to shield the community from external influences and internal change; to preserve the status quo within and to maintain the power differentials between genders, ages (the old versus the young) and caste. Evidence from other countries also supports this behaviour. For example, the Jewish Orthodox or Hassidic communities in USA,<sup>155</sup> Muslims in the UK,<sup>156</sup> the Roma and Muslims in Europe,<sup>157</sup> or Hindus in Pakistan and similarly Muslims in India.<sup>158</sup>

### 3.5.3 Protection Against Statelessness

Child marriage can also protect stateless children and allow them to be regularized as citizens and/or access education, formal employment, safety from arbitrary arrest and detention by police and otherwise treatment in accordance with law.<sup>159</sup> Pakistan has several stateless populations living within its territory, some of whom it recognizes and some of whom it does not acknowledge.<sup>160</sup> These communities predominantly belong to Bengali, Rohingya, and Afghan ethnicities.<sup>161</sup> It is estimated that a majority of these populations are living in Karachi, Sindh— often for multiple generations.<sup>162</sup> These communities do not have any identification documents—almost across the board. As a result, they have difficulties accessing adequate/minimum wages, safe, secure and legal employment, legally recognized marriage, property ownership, housing, utilities, education, health, avenues for improved quality of life, and access to civil and political freedoms of security, dignity and the right to be treated in

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<sup>153</sup> Reuben Ackerman, "Forced Conversions & Forced Marriages In Sindh, Pakistan," *Www.Birmingham.Ac.Uk* (Birmingham, UK: CIfORB, The University of Birmingham, 2018), [www.birmingham.ac.uk/Documents/college-artslaw/ptr/ciforb/Forced-Conversions-and-Forced-Marriages-in-Sindh.pdf](http://www.birmingham.ac.uk/Documents/college-artslaw/ptr/ciforb/Forced-Conversions-and-Forced-Marriages-in-Sindh.pdf).

<sup>154</sup> Menz, Sheila. "Statelessness and Child Marriage as Intersectional Phenomena: Instability, Inequality, and the Role of the International Community." *California Law Review* 104, no. 2 (2016): 497-543,516. Accessed January 12, 2021. <http://www.jstor.org/stable/24758730>.

<sup>155</sup> Amy Braunschweiger, "Witness: Child Marriage in the US," Human Rights Watch, October 28, 2020, <https://www.hrw.org/news/2017/02/13/witness-child-marriage-us>; JTA and Ben Sales, "Why New Jersey Orthodox Jews Stalled a Bill Banning Child Marriages," *Haaretz.com* (Haaretz, June 5, 2018), <https://www.haaretz.com/us-news/why-new-jersey-orthodox-jews-stalled-a-bill-banning-child-marriages-1.6152985>.

<sup>156</sup> Payzee Mahmood TEDxTalks, "A Survivor's Plea to End Child Marriage | Payzee Mahmood | TEDxLondonWomen," YouTube (YouTube, January 6, 2020), <https://www.youtube.com/watch?v=GkH0jZPLB5M>; littledotstudios, "Forced To Marry (Investigative Documentary) | Real Stories," YouTube (Real Stories, April 4, 2019), <https://www.youtube.com/watch?v=amwOFszEIKs>.

<sup>157</sup> Menz, Sheila. "Statelessness and Child Marriage as Intersectional Phenomena: Instability, Inequality, and the Role of the International Community." *California Law Review* 104, no. 2 (2016): 497-543,508. Accessed January 12, 2021. <http://www.jstor.org/stable/24758730>.

<sup>158</sup> 20, <https://www.icrw.org/wp-content/uploads/2016/10/CHILDMARRIAGE-F-13.pdf>

<sup>159</sup> Menz, Sheila. "Statelessness and Child Marriage as Intersectional Phenomena: Instability, Inequality, and the Role of the International Community." *California Law Review* 104, no. 2 (2016): 497-543,516. Accessed January 12, 2021. <http://www.jstor.org/stable/24758730>.

<sup>160</sup> Saher Baloch and Bilal Karim Mughal, *The Woes of Bengalis, Burmese and Iranians of Karachi*, *Dawn Herald* September 14, 2017;

<sup>161</sup> "[F]ive million illegal immigrants have been residing in different cities of Pakistan for more than three decades. The illegal immigrants, around two million Bangladeshis[Bengalis], 2.5 million Afghans[Afghans] and 0.5 million other nationals including Africans, Iranians, Iraqis and Myanmar's [Rohingyas], an official said on Monday.' "Five million illegal immigrants residing in Pakistan". *Express Tribune*. 16 January 2012.

<sup>162</sup> Irfan Ali, 75% of illegal immigrants in the country are living in Karachi, *Express Tribune* December 31<sup>st</sup>, 2010.

accordance with law.<sup>163</sup> Pakistan has neither signed any international instruments nor any key conventions recognizing the rights of refugees.<sup>164</sup>

In the foregoing circumstances, short of bribing officials of the National Database and Registration Authority (NADRA), marrying a Pakistani national identity card holder is the easiest, and in many cases the only way to become regularized as a legal resident— or to access the security of legality and legibility. Hence, the younger they marry, the sooner they may be able gain this access.

Of course, this strategy has its drawbacks and may also fail entirely. "Child marriage often leads to the loss of freedom of movement and work for the girl, the legitimization of domestic and sexual violence, and denial of access to education. ... Most of these marriages are unregistered so law enforcement cannot crack down on them."<sup>165</sup>

At the time of marriage, a stateless child bride would not be able to provide valid birth or identification documents as required.<sup>166</sup> The SCMRA 2013 stipulates that a medical examination and certification that can confirm age where identification documents cannot be provided.<sup>167</sup> In stateless populations that are almost entirely undocumented and have extremely limited access to healthcare (where they would be able to acquire a medical certificate as to age), it is extremely difficult to monitor the frequency of child marriage. It is also important to note that the practice of child marriage is also adopted by stateless populations, as with religious minorities, "as a means of "cultural, economic, and societal preservation and autonomy" in the face of systematic discrimination".<sup>168</sup>

It is unfortunately easy to either find a Nikkah Khuwan who would agree to solemnize the marriage without the requisite document or to get a fraudulent medical certificate made. Stateless persons may not be able to register their marriage, with NADRA or the local Union Council, on their own but they would be able to do so if one of the partners was a regular citizen. Moreover, the social and cultural strength of the institution of marriage alone will allow formerly stateless persons, significant access to more amenities, safety, security and justice.

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<sup>163</sup> Economic and Social Research Council 'The Informal Economy in Urban Violence: Karachi- Pakistan', Cardiff University (2017), 31; Fierlbeck, Katherine. "Redefining Responsibility: The Politics of Citizenship in the United Kingdom." *Canadian Journal of Political Science / Revue Canadienne De Science Politique* 24, no. 3 (1991): 575-93. Accessed November 1, 2020. <http://www.jstor.org/stable/3229168>; "Social and Economic Rights." In *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World*, edited by Brown Gordon, by Global Citizenship Commission, 63-70. Cambridge, UK: Open Book Publishers, 2016. Accessed November 1, 2020. <http://www.jstor.org/stable/j.ctt1bpmb7v.12>.

<sup>164</sup> "Pakistan regulates foreigners through the Foreigners Act of 1946. As such, all foreigners without proper documentation are subject to arrest, detention and deportation. Currently, the UNHCR is supporting Pakistan to introduce amendments to the Act entailing a definition of 'refugee\*' and the principle of non-refoulement." Noor, Sanam. "Afghan Refugees After 9/11." *Pakistan Horizon* 59, no. 1 (2006): 59-78, 65, footnote 16. Accessed November 20, 2020. <http://www.jstor.org/stable/41394381>.

<sup>165</sup> Chakraborty, Roshni, "Child Not Bride: Child Marriage Among Syrian Refugee" *Harvard International Review* 40, no. 1 (2019): 20-21, 21. Accessed January 12, 2021. doi:10.2307/26617388.

<sup>166</sup> Section 4, SCMRA 2013

<sup>167</sup> Section 4, SCMRA, 2013; Rules 3&4, SCMRR 2016

<sup>168</sup> Menz, Sheila. "Statelessness and Child Marriage as Intersectional Phenomena: Instability, Inequality, and the Role of the International Community." *California Law Review* 104, no. 2 (2016): 497-543,516. Accessed January 12, 2021. <http://www.jstor.org/stable/24758730>.

## 4 The Drivers of Change: The Harmful Impact of Child Marriage

The section above explores some of the reasoning behind why child marriages continue to be a widely prevalent and normalized practice. However, it must be reiterated that there is an overwhelming global consensus that child marriages are scientifically harmful and are undesirable from a social, psychological, civil, political, and rights-based perspective.<sup>169</sup> This section explores the harmful impacts of child marriages on the child.

### 4.1 Science: Health Concerns

As mentioned above, the WHO and UNFPA estimate tens of thousands of child marriages are contracted every day across the globe;<sup>170</sup> and approximately 50% of all marriages in Pakistan are likely to have been contracted when at least one of the spouses was below the age of 18 years.<sup>171</sup> In rural Sindh, girls are more than twice as likely to be married before the age of 16 than girls in urban areas.<sup>172</sup>

The WHO and other experts suggest that pregnancy complications and childbirth are one of the leading causes of death amongst girls aged 15 to 19 years across the globe.<sup>173</sup> A child born to a mother under the age of 19 has a 50% chance<sup>174</sup> of being still born or dying within the first year,<sup>175</sup> and such babies have a significant chance of being born with low birth weights and a host of other health problems.<sup>176</sup> Moreover, early exposure to sexual activity (which is expected once a child is married) can expose a young girl to a host of health issues and may also have serious psychological implications for her. Girls who are married below the age of 18 are also more likely to contract HIV or other sexually transmitted diseases.<sup>177</sup> A particularly alarming health risk for child mothers, whose bodies are not ready for birth, is obstetric fistula.<sup>178</sup> Obstetric fistula is a condition where the tissue between the vagina and the anus is

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<sup>169</sup> Article 16(2) of the Universal Declaration of Human Rights, Article 16 of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), The Convention on the Rights of the Child (CRC) delineates the rights of children: the right to survive, the right to develop to their fullest, the right to protection from harmful practices, abuse and exploitation, and the right to participate fully in family, cultural and social life. In signing the Convention, governments also committed to take, "all effective and appropriate measures with a view to abolish traditional practices prejudicial to the health of the children... which includes, among other practices, female genital mutilation/cutting and child marriage." "Marrying Too Young: Ending Child Marriage," 10, *UNFPA*, November 11, 2020, accessed November 12, 2020. <https://www.unfpa.org/sites/default/files/pub-pdf/MarryingTooYoung.pdf>.

<sup>170</sup> WHO, "WHO | Child Marriages: 39 000 Every Day," *Who.int*, May 21, 2014, <https://doi.org/10.1038/nm.2838>.

<sup>171</sup> Sarah Zaman, "Forced Marriages and Inheritance Deprivation in Pakistan" 11, *Aurat Foundation, Policy and Data Monitoring of Violence against Women in Pakistan*, October 2014, [https://www.researchgate.net/publication/325011498\\_Forced\\_Marriages\\_and\\_Inheritance\\_Deprivation\\_in\\_Pakistan](https://www.researchgate.net/publication/325011498_Forced_Marriages_and_Inheritance_Deprivation_in_Pakistan).

<sup>172</sup> Ayesha Khan, "Child Protection System Mapping and Assessment Sindh" 16, (Karachi: Collective for Social Science Research, 2013), [https://www.researchgate.net/publication/325950714\\_Sindh\\_Child\\_Protection\\_Mapping\\_and\\_Assessment](https://www.researchgate.net/publication/325950714_Sindh_Child_Protection_Mapping_and_Assessment).

<sup>173</sup> WHO, "WHO | Child Marriages: 39 000 Every Day," *Who.int*, May 21, 2014, <https://doi.org/10.1038/nm.2838>.

<sup>174</sup> According to the International Women's Health Coalition, this risk is 60%. "International Women's Health Coalition," *International Women's Health Coalition*, 2019, <https://iwhc.org/resources/facts-child-marriage/>.

<sup>175</sup> Girls Not Brides, "Health - Girls Not Brides," *Girls Not Brides*, 2012, <https://www.girlsnotbrides.org/themes/health/>; WHO, "WHO | Child Marriages: 39 000 Every Day," *Who.int*, May 21, 2014, <https://doi.org/10.1038/nm.2838>.

<sup>176</sup> Julie Freccero and Audrey Whiting, "Lessons from Research and Practice in Development and Humanitarian Sectors," 8, *Law.Berkley.Edu*, June 2018, [https://www.law.berkeley.edu/wp-content/uploads/2018/08/Toward-an-End-to-Child-Marriage\\_Report\\_FINAL.pdf](https://www.law.berkeley.edu/wp-content/uploads/2018/08/Toward-an-End-to-Child-Marriage_Report_FINAL.pdf).

<sup>177</sup> "Marrying Too Young: Ending Child Marriage," 11, *UNFPA*, November 11, 2020, accessed November 12, 2020. <https://www.unfpa.org/sites/default/files/pub-pdf/MarryingTooYoung.pdf>.

<sup>178</sup> "[O]bstetric fistula is a childbirth complication due to obstructed labour when the tissues between a woman's vagina and her bladder or rectum are damaged and this tissue dies from the continuous pressure from baby's head being stuck in the birth canal. The dead tissue falls off resulting in a hole through which the woman continuously leaks urine or feces or sometimes both." *Girls Not Brides*, "Fistula, a Silent Tragedy for Child Brides," *Girls Not Brides*, June 12, 2013, <https://www.girlsnotbrides.org/fistula-a-silent-tragedy-for-child-brides/>.

permanently damaged during childbirth and as a result, all or part of that tissue detached from the body and leaves a hole or a gap between the vagina and the urethra and/or anus. This leaves young mothers with a lifelong condition where they not only suffer physical pain but also do not have control over their excretion of urine and/or feces. Corrective surgery for this condition is sometimes possible but such a surgery is not widely accessible to young mothers.<sup>179</sup> A specific law, namely, Sindh Reproductive Healthcare Rights Act, 2019 was passed and notified. However, as noted above, a girl in Pakistan is unlikely to have access to reproductive health and/or contraceptives<sup>180</sup> and is very likely to be under pressure to prove her fertility by conceiving a child.<sup>181</sup>

According to the National Health Services, UK, it is approximately 4 years after beginning puberty that the outward physical manifestations of a fully developed female body are complete.<sup>182</sup> However in Pakistan, or generally under the Muslim paradigm, a girl is deemed ready for marriage, sex and childbirth as soon as she starts menstruating. A judgement of the Lahore High Court succinctly identifies the various risks associated with child marriage as follows:

*"Physically, child bride has small pelvis and are not prepared for childbearing. It results in deliveries that are too early or late. This exposes them to different complications. High mortality rates are due to postpartum hemorrhage, sepsis, obstructed labor and HIV transmission. Besides that, they are also at risk of acquiring Sexually Transmitted Infection and Cervical Cancer. To prove their fertility, they go for high frequency and unsafe intercourse with their old age polygamous spouse. Conjointly, the adolescent mother produces less breast milk or colostrum, which makes their child susceptible to infection. After marriage, girls are brought to their husband's place, where they have to play the role of wife, domestic worker, and ultimately a mother. Their husband may also be polygamous due to which they end up in burdensome situation and feel isolated, rejected, and depressed."*<sup>183</sup>

## 4.2 Economic Dependence

A woman who was married as a child will suffer a disadvantage as to her earning potential and, depending on her socio-economic class and a host of other factors, will likely be prevented from working altogether. However, the "relationship between child marriage and labor force participation is complex."<sup>184</sup>

It is observed that "specifically in low-income settings where labor markets tend to be informal and where many women, faced with poverty, must work simply for the household to survive, the impacts of lower educational attainment on women's labor market participation may be less salient". A woman's participation in the labour force may in fact be unaffected by the marriage itself, or she may be forced to work to support growing domestic and childcare needs. A study conducted by the World Bank, across 15 developing countries showed that

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<sup>179</sup> Ibid

<sup>180</sup> Qureshi, R.N., Sheikh, S., Khowaja, A.R. et al. Health care seeking behaviours in pregnancy in rural Sindh, Pakistan: a qualitative study. *Reprod Health* 13, 34 (2016). <https://doi.org/10.1186/s12978-016-0140-1>

<sup>181</sup> "Marrying Too Young: Ending Child Marriage," 11, *UNFPA*, November 11, 2020, accessed November 12, 2020. <https://www.unfpa.org/sites/default/files/pub-pdf/MarryingTooYoung.pdf>; Girls Not Brides, "Health - Girls Not Brides," Girls Not Brides, 2012, <https://www.girlsnotbrides.org/themes/health/>.

<sup>182</sup> NHS UK, "Stages of Puberty: What Happens to Boys and Girls," nhs.uk, April 26, 2018, <https://www.nhs.uk/live-well/sexual-health/stages-of-puberty-what-happens-to-boys-and-girls/#:~:text=The%20average%20age%20for%20girls>.

<sup>183</sup> Para 9, P L D 2020 Lahore 811

<sup>184</sup> Quentin Wodon et al., "Economic Impacts of Child Marriage: (Conference Edition) June 2017, Global Synthesis Report Report," *World Bank* (World Bank, June 27, 2017), <chrome-extension://oemmnndcblldboiebfnladdacbfmadadm/http://documents1.worldbank.org/curated/en/530891498511398503/pdf/116829-WP-P151842-PUBLIC-EICM-Global-Conference-Edition-June-27.pdf>

"[i]n most countries, with the exception of Bangladesh, marrying as a child appears to increase women's likelihood of labor force participation as an adult."<sup>185</sup> Nevertheless, in the absence of similar data from Pakistan, and relying on the fact that the socio-cultural make-up of Bangladesh is closer to Pakistan than the other countries that were part of this study, it can be assumed that child marriage is likely to have a negative relationship with labour force participation in Pakistan as well.

Even though she may be working as part of the labour force, "higher fertility associated with child marriage may influence women's roles in the labor market and the number of hours they are able to work. Frequent interruptions to employment due to childbirth and the time-consuming burden of care responsibilities can also affect the types of jobs that women can engage in, forcing them into lower-paying jobs and more unstable work situations. Child marriage can also curb women's agency and limit their bargaining power in their households, including possibly with regards to the decision to enter the labor force."<sup>186</sup>

The abovementioned World Bank study notes that the overall effect of child marriage on labour force participation may be small.<sup>187</sup> However, economic independence, the autonomy to spend the money earned and the ability to save money are both significantly affected by child marriage. Not only is a child bride less likely to have economic decision-making power in the household but she is also likely to have the additional burden of childcare and associated costs. Moreover, while the labour force participation itself may not be significantly affected, the professional qualification that the woman is able to acquire, her ability seek out career growth opportunities and the physical constraints caused by motherhood or domestic responsibilities, may significantly affect the quality and security of her employment. These should be understood as "the foregone earnings due to child marriage".<sup>188</sup>

Women in Pakistan are less likely, than men, to be registered with NADRA and often do not have national identity cards (CNICs), which are issued when a person turns 18 years of age.<sup>189</sup> CNICs are a prerequisite for any formal employment and frequently for informal employment as well. When a woman is married as a child, before having been issued a CNIC, she is even less likely to have a CNIC made, and hence to be able to seek formal or safer employment.

As a result, women who are given in child marriage are unlikely to be able to attain the financial independence and/or financial security that they may practically require in order to feel self sufficient and secure. If they wanted to leave the marriage and/or are stuck in an abusive household the lack of financial independence, self sufficiency and security ay even prevent these women from seeking divorce or seeking custody of their children or seek emancipation. Even otherwise, they are unlikely to have financial and social autonomy and/or independence to pursue higher education or vocational training or career growth and may, thus, remain financially (and socially) dependent on the family structure.

Firstly, this inability to seek economic upward mobility will also mean that they may get caught in a cycle of poverty. Having to raise their children in poverty, and consequently being unable to give educational and other opportunities to them, will ultimately mean that the children remain caught in the economy of informal, insecure and/or low paying jobs, with great probability of being married off young in order to relieve the family of their economic burdens, as described in Section 4.2 above.

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<sup>185</sup> Ibid

<sup>186</sup> Ibid

<sup>187</sup> Ibid

<sup>188</sup> Ibid

<sup>189</sup>"Survey Assessing Barriers to Women Obtaining Computerized National Identity Cards(CNICs)," *Aceproject.Org* (Washington, DC: International Foundation for Electoral Systems, February 2013), <chrome-extension://oemmnadbldboiebfnladdacbfmadadm/http://aceproject.org/electoral-advice/archive/questions/replies/277728362/962062828/IFES-PK-Survey-Assessing-Barriers-to-Women.pdf>.

Secondly, child marriage ties women and girls to a lifetime of unpaid domestic labour and often includes taking care of the children, the spouse and the entire family of the spouse. If there are family lands or a family enterprise of the family she marries into, then she may also be required to contribute her labour to that without being remunerated and without have any pre-decided terms of employment.<sup>190</sup>

Lastly, the economy will likely continue to have an overabundance of unskilled labour, frequently working in the informal economy; and a dearth of specialized, skilled labour and enterprise that could help the economy grow.<sup>191</sup>

On the other hand, if she belongs to a socio-economic class where her household may survive without her income, she may not be allowed by her family to work and gain financial independence. She is unlikely to have agency in deciding whether she wants to be engaged in employment outside the house or not.<sup>192</sup> Moreover, child marriage in Pakistan usually means that a girl's education is stopped at or before the time of marriage. Some women (from the higher end of the socio-economic class spectrum) may be able to access better educational opportunities as a result of having been married and socially 'secured'— but this is not the norm.<sup>193</sup> Moreover, if a woman has mothered children, she may not be able to pursue employment as she may be physically constrained for time and by other domestic responsibilities, coupled with the lack of shared or safe and effective child care options, particularly for those not belonging to the upper middle class.

### **4.3 Continuum of Harms:<sup>194</sup> Beyond Marriage and Childhood**

The harm incurred by child marriage does not end at the moment of contracting the marriage and the end of childhood itself. It has several physical, sexual, psychological and economic harms associated with it, as discussed above.

A child bride, by virtue of being a child in a coercive situation, is unlikely to be able to access bodily autonomy or her civil and political rights, or her rights to education, healthcare, judicial remedies and so forth.

It is reported that a child bride is 50% more likely to face domestic violence. She is also likely to face marital rape and be coerced into sexual relations that she does not consent to. As a result, she will suffer physical and mental health problems.

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<sup>190</sup>Antra Bhatt and Ginette Azcona, "Unpaid Care and Domestic Work: We're Not All in the Same Boat | UN Women Data Hub," data.unwomen.org, May 2020, <https://data.unwomen.org/features/unpaid-care-and-domestic-work-were-not-all-same-boat>.; "Redistribute Unpaid Work," UN Women, 2019, <https://www.unwomen.org/en/news/in-focus/csw61/redistribute-unpaid-work>.; Ruth Messinger and Seth Earn, "Child 'Marriage' Is Child Labour," The New Humanitarian, June 12, 2017, <https://www.thenewhumanitarian.org/opinion/2017/06/12/child-marriage-child-labour>.

<sup>191</sup> Quentin Wodon et al., "Economic Impacts of Child Marriage (Conference Edition) June 2017 Global Synthesis Report". 85, *World Bank* (World Bank, June 27, 2017), <chrome-extension://oemmnadbldboiebfnladdacbfmadadm/http://documents1.worldbank.org/curated/en/530891498511398503/pdf/116829-WP-P151842-PUBLIC-EICM-Global-Conference-Edition-June-27.pdf>.

<sup>192</sup>Y Zaidi et al, "Women's Economic Participation and Empowerment: Status Report 2016," *UN Women | Asia and the Pacific* (Islamabad: UN Women, 2016), <https://asiapacific.unwomen.org/en/countries/pakistan/wee/wee-participant>.; Saad Gul, "Women's Economic Empowerment," *The Express Tribune*, August 14, 2020, <https://tribune.com.pk/story/2259530/womens-economic-empowerment-1>.

<sup>193</sup> Sarah Zaman points out that in some north African countries, educational opportunities may increase for rural women who may more to cities or generally for women after they are married. However, this does not appear to be the case in contemporary Pakistan. LAS Consultation on the Implementation of the Sindh Child Marriage Restraint Act, October 28, 2020, Legal Aid Society, Virtual Meeting.

<sup>194</sup>Sarah Malkani, "Ending Impunity for Child Marriage in Pakistan: NORMATIVE AND IMPLEMENTATION GAPS,"8, *Reproductiverights.Org* (New York, NY, USA: Center for Reproductive Rights, 2018), [https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/64785006\\_ending\\_impunity\\_for\\_child\\_marriage\\_pakistan\\_2018\\_print-edit-web.pdf](https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/64785006_ending_impunity_for_child_marriage_pakistan_2018_print-edit-web.pdf).

In addition to this, if a child is subjected to sexual intercourse before their body is ready, and particularly against their will, they are likely to develop a multitude of health problems, as discussed above. Moreover, a child bride is likely to be pressured to prove her fertility; and as discussed above, childbirth can carry significant health risks and can even prove fatal for a mother under the age of 19 years.

There are several mental health problems, including but not limited to feelings of deindividuation, anxiety, depression, and Post Traumatic Stress Disorder (PTSD), that she may develop.<sup>195</sup>

Children born to mothers with these physical and mental health issues may be weak at birth; and/or be brought up less attentively owing to the mothers' own health problems or financial problems; and/or may suffer several psycho-social problems and possible health problems of their own.<sup>196</sup>

The abovementioned problems will also result in added costs of healthcare for the family. Additionally, a child bride is unlikely to have opportunities for education and career development which might lead her (and her family) to suffer income loss and economic deprivation. She is also unlikely to be able to afford and/or encourage education for her children.<sup>197</sup>

The existing law (SCMRA 2013), which will be analysed in detail in Section 5 below, only enables someone who can find their way to the police or the Judicial Magistrate, to report a child marriage. A child victim or someone close to them are unlikely to be able to report at all. Even if they did manage to report, there is a dearth of functional Child Protection Units, nor any other shelters where women and children who are rescued from child marriages may be kept safely and rehabilitated.

More alarmingly, only an adult is competent to file a suit before the court. Therefore, because she does not have a national identity card (which is issued at the age of 18 years), a child bride is not competent to approach the court to seek divorce or seek *Khula*,<sup>198</sup> seek custody of her children and to petition to seek protection against domestic violence (under the Domestic Violence (Prevention and Protection) Act, 2013) without using an intermediary who may file on her behalf. The practice is that a guardian or a 'Next Friend' may have to file on behalf of a child.<sup>199</sup> Nevertheless, based on the fact that Muslim Personal Law takes precedence in these matters, some High Court judgements have acknowledged the right of a person under 18 years of age to approach the Courts directly: "A Muslim though under 18 years on attaining puberty, can bring a suit relating to marriage, dower and divorce without next friend."<sup>200</sup>

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<sup>195</sup> Daro, Deborah. "A Shift in Perspective: A Universal Approach to Child Protection." *The Future of Children* 29, no. 1 (2019): 17-40. Accessed November 14, 2021. <https://www.jstor.org/stable/26639554>; Reitsema, A. M., and H. Grietens. "Is Anybody Listening? The Literature on the Dialogical Process of Child Sexual Abuse Disclosure Reviewed." *Trauma, Violence & Abuse* 17, no. 3 (2016): 330-40. Accessed January 14, 2021. doi:10.2307/26638129.

<sup>196</sup> Watkins, Daphne C., Chavella T. Pittman, and Marissa J. Walsh. "The Effects of Psychological Distress, Work, and Family Stressors on Child Behavior Problems." *Journal of Comparative Family Studies* 44, no. 1 (2013): 1-16. Accessed January 14, 2021. <http://www.jstor.org/stable/43613072>; Isaac Youcha. "Long-Term Psychological and Physiological Consequences of Trauma in Childhood Revisited: Implications for the Group Therapist's Use of Methods and Styles of Leadership." *Group* 37, no. 1 (2013): 41-56. Accessed January 14, 2021. doi:10.13186/group.37.1.0041.

<sup>197</sup> Kruttschnitt, Candace, Jane D. McLeod, and Maude Dornfeld. "The Economic Environment of Child Abuse." *Social Problems* 41, no. 2 (1994): 299-315. Accessed January 14, 2021. doi:10.2307/3096935; Naana Otoo-Oyortey, and Sonita Pobi. "Early Marriage and Poverty: Exploring Links and Key Policy Issues." *Gender and Development* 11, no. 2 (2003): 42-51. Accessed January 14, 2021. <http://www.jstor.org/stable/4030639>.

<sup>198</sup> Where the right of divorce is unilaterally exercised by the woman.

<sup>199</sup> Luke Victor, Human Rights Legal Associate, LAS Consultation on the Implementation of the Sindh Child Marriage Restraint Act, October 28, 2020, Legal Aid Society, Virtual Meeting.

<sup>200</sup> Paragraph 18, *P L D 2020 Lahore 811*

In term of social and societal harms, in the international arena, the discourse on child marriage is also aligned with that of child prostitution:

"Although child marriage is rooted in traditional notions of honor and purity, the practice shares many characteristics with child sex trafficking and prostitution. The two concepts may seem paradoxical, given their relative places in the private and public spheres. However, both notions "endorse intimate contact with often unfamiliar men," and some scholars note that the discourse around child marriage is beginning to align more closely with the moral approbation associated with child prostitution....both child prostitution and early marriage involve economic transactions between a "client" and a "supplier." Many practices demand either a "brideprice," paid to the bride's family from the groom, or a dowry, which the bride is expected to bring to the marriage. In both cases, the girl is cut out of the economic transaction and can rarely access the payment. Second, both practices involve a lack of consent and a fundamental violation of human rights... [selling the child] into sex slavery as a prostitute or to sell her into sexual bondage as a child bride, without... meaningful consent...Their freedom [...] curtailed by "employer[s]"—or husbands—who have complete authority over their actions and interactions. In the case of child marriage, girls are tied to their husbands not only through marriage but also through the social stigma that accompanies divorce."<sup>201</sup>

While marriage, and thus child marriage, can be a source of protection , it can also open the spouses and their offspring up to a host of vulnerabilities, as discussed above. Child brides are 50% more likely to suffer domestic violence, economic abuse, forced labour, sexual assault, and maternity death. Their children are also likely to suffer.

*"The life of the married person is suffering', a woman once declared somewhat abruptly in the middle of a wedding feast. She was referring to the vexing issue that although marriage is enshrined and celebrated by state and church, it puts individuals in mortal danger. The local perception that marriage can be deadly is not merely metaphorical; it speaks to an underlying sentiment that links the conjugal union to three types of potential death: spiritual, social and physical."*<sup>202</sup>

#### **4.4 Rule of Law and Gender Equality**

As noted earlier above, in preindustrial times, children and wives were not deemed to be under the purview of the State. They were subsumed in the private realm and were the proprietary interest of their father/husband. However, it is interesting to note that this complete subsuming of the wife, in particular, is more a part of colonial heritage of statehood and legal systems. A judgement of the Honourable Supreme Court of Pakistan usefully summarizes the legal transition of women (and distinguishes the same from traditional and Islamic beliefs):

*"Sir William Blackstone<sup>11</sup>described the doctrine of coverture: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French a feme-covert...". In her comprehensively researched book Amy Louise Erickson writes, "Under common law a woman's legal identity during marriage was eclipsed -literally*

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<sup>201</sup> Menz, Sheila. "Statelessness and Child Marriage as Intersectional Phenomena: Instability, Inequality, and the Role of the International Community." *California Law Review* 104, no. 2 (2016): 497-543,516-17. Accessed January 12, 2021. <http://www.jstor.org/stable/24758730>.

<sup>202</sup> Mayblin, Maya. "Death by Marriage: Power, Pride, and Morality in Northeast Brazil." *The Journal of the Royal Anthropological Institute* 17, no. 1 (2011): 135-53, 135. Accessed December 3, 2020. <http://www.jstor.org/stable/23011575>.

*covered -by her husband. As a 'feme covert', she could not contract, neither could she sue nor be sued independently of her husband. ... The property a woman brought to marriage -her dowry or portion -all came under the immediate control of her husband". It was only on the passing of the Married Women's Property Act, 1882 that in England a married woman became, "capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee"... The situation in the United States of America of married women was no better, they had no legal existence apart from their husbands. The reason for a married woman's servile status was sought to be explained by the Supreme Court of Illinois, "It is simply impossible that a married woman should be able to control and enjoy her property as if she were sole, without practically leaving her at liberty to annul the marriage". The unjustness of the laws was severely criticized. Elizabeth Cady Stanton listed in the Declaration of Sentiments "the injuries and usurpations on the part of man toward woman"- "He has made her, if married, in the eye of the law, civilly dead. He has taken from her all right in property, even to the wages she earns... the law, in all cases, going upon a false supposition of the supremacy of a man, and giving all power into his hands".<sup>203</sup>*

Later the modern nation state started becoming more and more invested in the welfare of women and children.<sup>204</sup> It started making laws and establishing infrastructure that could ensure their welfare. Slowly but surely— over the course of the last century, protection of children, gender equality and equal treatment of men and women, as citizens, also made their way to the core principles of statehood.<sup>205</sup> These principles stipulate that all citizens must have equal recourse to rights and to justice systems, and must be treated in accordance with the law. These principles were also universalized and upheld through documents such as the Universal Declaration of Human Rights (UDHR), the International Convention on Civil and Political Rights (ICCPR), and the International Convention on Economic Social and Cultural Rights (ICESCR). Any nation that wanted to belong to a global community of civilized nations had to pledge allegiance to these principles and to adopt and enforce them in their respective countries. Pakistan has ratified and hence stated allegiance to global norms articulated in the UDHR, ICCPR, ICESCR, the Child Rights Convention (CRC), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).<sup>206</sup>

According to the Constitution of Pakistan, 1973, men and women are equal citizens<sup>207</sup> and are equally entitled to: access public life,<sup>208</sup> education,<sup>209</sup> employment,<sup>210</sup> a safe and healthy life, and to be treated in accordance with law.<sup>211</sup> The Constitution, 1973, also provides several specific guarantees to children. These particularly include equality, non-discrimination, education up to 16 years of age,<sup>212</sup> and protection against slavery and forced and/or underage labour<sup>213</sup>. The aspirational Principles of Policy articulated in the Constitution, 1973 include

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<sup>203</sup> Para 10, 11, Order dated: 07.02.2020, passed by the Honourable Supreme Court of Pakistan, in Civil Petitions No.154 and 155 of 2019; William Blackstone, Commentaries on the Laws of England(Volume 1, Oxford University Press, 1765) p. 442; Amy Loise Erickson, Women and Property in Early Modern England (London and New York: Routledge, 1993) p. 24; Elizabeth Cady Stanton, A History of Woman Suffrage(Vol. I, Rochester, New York: Fowler and Wells, 1889)

<sup>204</sup> Philippe Ariès, *Centuries of Childhood : A Social History of Family Life* (New York: Vintage Books, 1962).

<sup>205</sup> Philippe Ariès, *Centuries of Childhood : A Social History of Family Life* (New York: Vintage Books, 1962).

<sup>206</sup> Human Rights Treaty Bodies UN, "Ratification Status for Pakistan ," UN Treaty Body database (United Nations, 2020), [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=131&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=131&Lang=EN).

<sup>207</sup> Article 25, Constitution of Pakistan, 1973

<sup>208</sup> Article 26, Constitution of Pakistan, 1973

<sup>209</sup> Article 25A, Constitution of Pakistan, 1973

<sup>210</sup> Article 27, Constitution of Pakistan, 1973

<sup>211</sup> Articles 9 and 14, Constitution of Pakistan, 1973

<sup>212</sup> Articles 25, 26 and 25A, Constitution of Pakistan, 1973

<sup>213</sup> Article 11, Constitution of Pakistan, 1973

protection of children from unsafe employment,<sup>214</sup> participation of women in national life,<sup>215</sup> and protection of the family<sup>216</sup>.

### **The Dualism of Rule of Law in Pakistan**

According to its Constitution, Pakistan aspires to be a modern (liberal) democratic nation state *and* an Islamic Republic.<sup>217</sup> In either form of Statehood, it needs to provide certain rights and guarantees to its women and children to establish its writ as a State. (But this duality may have its own potentially which is yet to be fully explored).

First, the Constitution of Pakistan, 1973, simultaneously aspires to the ideals of a (liberal) democracy<sup>218</sup> and an Islamic Republic.<sup>219</sup> These two ideals can co-exist for the most part as long as a certain degree of non-implementation of either ideal (of liberal democracy and Islamic republic) is maintained. But if one ideal is asserted more forcefully than the other, it will have to confront the other ideal.<sup>220</sup> The issue of child marriage forces these two ideals to confront each other. On one hand the State professes its commitment to the protection of children through its Constitution, and there is a State law that prohibits child marriage (CMRA 1929, SCMRA 2013) and it has ratified several international treaties and conventions. On the other hand it does not automatically invalidate any child marriage by law, because the majority public, cleric, judicial and law enforcement opinion has been that any marriage with a girl who has begun menstruating (or even before that if the marriage is unconsummated) is Islamically valid.<sup>221</sup> Therefore, it is presumed that if any serious attempt is made to practically and principally eradicate child marriage, then the State would have to find a configuration that asserts one ideal without unsettling the other to a point where the writ of the State or the Constitution can sustain against severe challenges such as a breakdown of law and order.

However, it must be understood that there are several other rights, that are Islamically guaranteed to women, that would not be accessible to them within the confines of a child marriage. For example:

“Men shall have the benefit of what they earn and women shall have the benefit of what they earn”. The Holy Qur’an also prohibits taking another’s property –“Do not eat up (or consume) one another’s property”. Women’s share in inheritance are also precisely ordained. What a woman inherits is hers and hers alone; neither her husband, father, brother or son has any entitlement to it; a woman also does not need permission to dispose of her property or to acquire property.... A husband and wife, who were both Government servants, had challenged an office memorandum of the Government which did not treat husband and wife alike. The Federal Shariat Court comprehensively attended to the question of discrimination and the status of a married woman in Islam and after referring to a number of verses of the Holy Qur’an held: “These Verses clearly confirm the right of earning, owning and possessing by male and female -all in the like manner -and emphasizes again and

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<sup>214</sup> Article 37, Constitution of Pakistan, 1973

<sup>215</sup> Article 34, Constitution of Pakistan, 1973

<sup>216</sup> Article 35, Constitution of Pakistan, 1973

<sup>217</sup> Article 7, read with Chapter I & II (Articles 8-40), and Articles 2 & 2A Constitution of Pakistan, 1973

<sup>218</sup> Article 7, read with Chapter I & II (Articles 8-40), Constitution of Pakistan, 1973

<sup>219</sup> Articles 2 & 2A, Constitution of Pakistan, 1973

<sup>220</sup> Faisal Siddiqi, Advocate Supreme Court of Pakistan, Key Informant Interview dated: 18<sup>th</sup> October 2020

<sup>221</sup> It must be pointed out, again, that the lack of jurisprudential evolution that this evidenced in this Islamic understanding is neither universal nor necessary. The extremely bare bones explanation for this is that the development of Islamic jurisprudence, which is inherently responsive and open to change, was stopped arbitrarily near the 13<sup>th</sup> Century, presumably for the consolidation of power and maintenance of status quo. Just as interpretations of childhood and marriageability have evolved with evolving economies, societies and human bodies, in different parts of the world, as can the Islamic jurisprudence qualify its view on child marriage. Several feminist readings of Islamic jurisprudence have already pointed this out.

again that no one can be deprived of his/her due share for any reason. Both are equally entitled to their own individual shares on the basis of their services, duties and functions performed by each one. Each one is at par with the other in this respect, without any discrimination. The rights of each one accrued thus in no manner could be infringed, curtailed or diminished.” The Federal Shariat Court held that, “one of the principles which is the hallmark of Islamic injunctions is the principle of equality before law and equal protection of law for all people, irrespective of their gender, colour or creed”. Elaborating further the Court observed, that: “This fraternity and equality is all pervading and is not only a matter of form but is indeed a matter of substance. It emphasizes equality before law and equal protection of law. In this respect, Sharia does not make any distinction between the citizens of an Islamic State. Here we find no concept of discrimination in the administration of justice between one person and another on any basis. In social and legal perspectives, no human being can be denied or deprived of any fundamental right, nor any juridical right can be reserved for any particular group on the external consideration of his wealth, status caste or colour or any other ground. It clearly shows that equality before law and equal protection of law is the cardinal principle which runs like a golden chord in all Injunctions of Islam.” A chasm existed between a woman’s position in Islam to that which prevailed till a century ago in Europe and America where upon marriage a wife stood deprived of her property, which became that of her husband to do with it as he pleased.”<sup>222</sup>

The second issue is that in order to establish and/or consolidate its writ (that is, its sole jurisdiction over all governance related matters and their enforcement) and justify its monopoly over violence (that is, its sole jurisdiction over use of violence to secure the country and to maintain law and order —maintaining control over deciding what is a crime and its complementary punishment, when is it committed and enforcing its punishment), the State of Pakistan has to (a) establish rule of law and deliver on its constitutional guarantees and (b) eradicate any parallel systems of law making, law enforcement, justice and punishment.<sup>223</sup> For the state to consolidate its writ, it must have free & productive citizens who have been guaranteed civil, political, economic, social and cultural rights in accordance with the Constitution, 1973, and these citizens must have recourse to justice systems that can enforce their rights. However, as noted earlier in this study, women and children, particularly those in rural areas, remain subject to complete control by their families and to a host of customary practices, customary ‘laws’ and justice systems such as *Jirgas*, *Faislos* and so forth. These parallel customary systems are largely unregulated by the State and its Constitutional guarantees.

Unwittingly or not, the issue of child marriage could be definitive of Pakistani Statehood.

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<sup>222</sup> Para 13,-15, Order dated: 07.02.2020, passed by the Honourable Supreme Court of Pakistan, in Civil Petitions No.154 and 155 of 2019; Al-Qur’an, Surah An-Nisa(4) verse 32; Al-Qur’an, Surah An-Nisa(4) verse 29; Al-Qur’an, Surah An-Nisa(4) verses 7, 11 and 12; Al-Qur’an, Surah An-Nisa (4)verses 24 and 25; Surah Maidah(5) verse 5; Surah Mum’tahanah(60) verse 10; Al-Qur’an, Surah Al-Baqarah(2), verse 240;; Al-Qur’an, Surah Al-Baqarah(2) verse 143, Surah Al-Imran(3) verse 171, Surah An-Nisa(4) verse 32, SurahAl-Kahf(18) verse 30 and Surah Az-Zumar(39) verse 70; Sahih al-Bukhari, Sahih Muslim, Sunan Abu Dawud, Sunan al-Tirmidhi, Sunan al-Nasa’i, and Sunan Ibn Majah; Kazim Hussain v Government of Pakistan, PLD 2013 Federal Shariat Court 18, pg. 36-39

<sup>223</sup> Farah Zia and Nazish Brohi, “‘Laws Are a Critical Starting Point’ | Special Report | Thenews.Com.Pk,” [www.thenews.com.pk](https://www.thenews.com.pk/tns/detail/562198-laws-critical-starting-point), November 27, 2016, <https://www.thenews.com.pk/tns/detail/562198-laws-critical-starting-point>.; Nazish Brohi, “Women, Violence and Jirgas: Consensus and Impunity in Pakistan” (Islamabad, Pakistan: National Commission on Status of Women, 2017).

## **5 Mechanics of the Law: Sindh Child Marriage Restraint Act, 2013**

The province of Sindh passed the Sindh Child Marriage Restraint Act (SCMRA) 2013 and raised the minimum age for marriage of girls from 16 to 18 years, making it compatible with the minimum age of marriage for boys. In 2016, the Government of Sindh promulgated the Sindh Child Marriage Restraint Rules (SCMRR) 2016. The sanitized manner in which child marriage is presented in the law is dissonant from the messy reality described above. As Zaman and Zia note with respect to rape, the social category is different from the legal category;<sup>224</sup> this is true for child marriage too. Nevertheless, to understand how the existing law may be used to address child marriages, mechanics of the SCMRA and supplementary laws must be understood.

### **5.1 What is child marriage?**

Section 2(a) of the SCMRA defines 'child' as a male or female under 18 years of age. Section 2(b) of the SCMRA defines 'child marriage' as a marriage in which either party to the marriage is a child. It does not (i) fully acknowledge or respond to the interim period of adolescence between childhood and adulthood where an adolescent may be able to make certain decisions such as give sexual consent (at age 16) or marry voluntarily (ii) differentiate between and respond to the different types of child marriage discussed in the Section 1, 2 & 3 of this study, and (iii) address the question of whether a marriage is consensual or not, or under what circumstances a marriage can be consensual (details of which have been discussed in Section 2 above) and/or whether such a marriage would be treated differently than a forced marriage.

### **5.2 Who is to be held accountable for a child marriage?**

Section 3 of the SCMRA states that any male adult who is found to have contracted a marriage with a child shall be liable to imprisonment for a minimum of two years. In addition to this, Section 4 of the SCMRA stipulates that: anyone who "performs, conducts, directs, brings about or in any way facilitates any child marriage shall be punished with rigorous imprisonment which may extend to three years but shall not be less than two years and shall also be liable to fine, unless he proves that he had reason to believe that the marriage was not a child marriage." Section 5 of the SCMRA stipulates that a parent or guardian will be presumed to be responsible and held accountable for negligently failing to prevent the marriage of a child unless they can prove the contrary to be true. This means that anyone from parents to clerics to village elders and extended family members, may be held accountable. Rule 3 of the SCMRR specifically sets the minimum requirement on the person solemnizing Nikah to ascertain the age of both parties contracting the marriage. This rule requires the person solemnizing the Nikah to attach attested copies of national identity cards (CNIC) of both parties, or a medical certificate for age in case a CNIC is not available. It also requires both, the person solemnizing the marriage and the person issuing a medical certificate, to attach to the Nikah Nama, an affidavit stating that they themselves have satisfied themselves that both parties to the marriage are eighteen years of age.

### **5.3 How is Child Marriage reported?**

Section 7, of the SCMRA, elaborated by Rule 5 of the SCMRR, state that an application may be made to the Court, which must, after providing an opportunity of hearing to the other side, issue an injunction prohibiting an impending child marriage in instances where the marriage

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<sup>224</sup>Sarah Zaman and Maliha Zia, "How Much Rape Is Rape?," in *Disputed Legacies: The Pakistan Papers* (Chicago: UChicago Press- Seagull Books- Zuban Books-, 2019), 155–213, 157.

has not yet occurred.; in other instances, the Court must proceed with trial. Section 9 states that the Court must conclude its proceedings within 90 days.

Rule 6 of the SCHMRR states that a complaint may be made to the police who are bound to investigate the matter. Rule 8 states that the Criminal Procedure Code must be followed while doing so.

It is imperative that two or more separate FIRs should be lodged with the police. One FIR or private complaint must be filed for child marriage which may only be tried by a Judicial Magistrate, as stipulated by Section 6 of the SCMRA 2013. Then, second, an FIR must also be filed for affiliated or concurrent crimes, such as abduction, kidnapping and rape (including but not limited to Section 359 to Section 377 of the Pakistan Penal Code, 1860; these affiliated crimes are detailed in Section 7 below), that are triable by the Sessions Courts. Alternatively, the Investigation Officer of the Police can submit two separate challans before the Judicial Magistrate and request for the challan for crimes triable by the Sessions Court be

It is important to note that two different FIRs may not be lodged for the same crime.<sup>225</sup> However, multiple different crimes are likely to be committed when a child marriage takes place. For example, the crime of rape and the crime of child marriage are two distinct crimes. Rape occurs when there is bodily penetration and child marriage occurs when the marriage is solemnized (i.e., not when it is consummated).

In the given scenario, lawyers have also distinguished these crimes and helped their clients lodge a private complaint against the child marriage and an FIR against the rape of a minor; thus being careful to separate the two crimes from the beginning and hence not having to rely on the Magistrate to bifurcate the FIR.<sup>226</sup> However, firstly, a common citizen, who does not have a lawyer before they approach the police or make an application before the Court, is unlikely to know these jurisdictional problems and police officers are also commonly found to be ignorant or apathetic to the issue and are unable to guide the complainant accordingly. Secondly, when a private complaint is filed, the complainant bears an additional burden of providing the preliminary evidence as it is not the responsibility of the police to investigate the matter from scratch. It would be more useful to file two separate FIRs. This forces the victim to pursue two separate cases, and then a third case for the annulment of marriage.

A rape case is an offence against the state and an accused would be prosecuted by the State regardless of whether the victim wanted or could pursue the case or not. That is, *“when a person comes to a police station and makes a statement regarding the commission of an offence, the police are bound to record it verbatim and thereafter only, review the contents to see if a cognizable offence has been committed. Both the court of law and law enforcement officers differentiate cognizable and non-cognizable offences in terms of subsequent action, i.e., a cognizable offence may lead to an arrest without a warrant from a magistrate, whereas arrest in non-cognizable offence can be carried out with prior written approval in the form of a warrant approved by a magistrate. Rape is a cognizable offence”*.<sup>227</sup> On the other hand, this is not true of a case for child marriage, which may or may not be pursued till the end, as per the wishes of the complainant, victim or their family. Nevertheless, as described above, even though arrests cannot be made without warrant in a child marriage case, the child themselves must be taken into protective custody, as per law.

The existing law does not enable a child to report the child marriage themselves nor does it account for the many hurdles to reporting that a concerned but powerless family member or friend will face whilst reporting. It is almost impossible for an unchaperoned child or their

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<sup>225</sup> Article 13, Constitution, 1973

<sup>226</sup> Luke Victor, discussing the case proceedings of the recent child marriage cases that he has worked on, LAS Consultation on the Implementation of the Sindh Child Marriage Restraint Act, October 28, 2020, Legal Aid Society, Virtual Meeting.

<sup>227</sup> 21, Ayesha Khan & Sarah Zaman, The Criminal Justice System and Rape.

friend or a powerless family member to make their way to the police station or to make an application to the Court. The reporting provision is almost completely blind to the ground realities of Pakistani society, which do not allow for unchaperoned (women and) children from making their way to the police station or for them to submit an application to the Court without alerting the family patriarch, the household, the neighborhood, or the community that arranged or facilitated the child marriage. Moreover, if the complainant is illiterate, lives in a remote village and/or lacks the financial means to arrange for transport, they will not be able to make an application to the Court and/or reach the police station. In addition to this, there is no guarantee that the complainant or the child who is being subjected to a forced marriage will be given, or taken into, protective custody, or that they will be afforded any safety after they have lodged the complaint. The absence of a telephonic helpline that may take an oral complaint or child protection services or shelter homes that may take care of the child and/or the complainant after they have reported a child marriage, makes the very reporting of child marriage to be dangerous as the child and/or the complainant may suffer grave consequences at the hands of their family or community. Moreover, the present provisions for reporting are only conducive to men, who are able to freely navigate the public space and/or to women who have considerable access to power and/or privilege. As a result, most reported cases of child marriages are reported by parents or elders when a child has married for love as per their own will or (to a lesser degree) when the child has been abducted and forcibly married.

#### **5.4 Can a Child be Physically Rescued from a Child Marriage or the Threat Thereof?**

Rule 8 of the SCMRR stipulates that a child who has been married or is about to be married must be taken into police custody and presented before the Court within 24 hours, particularly when the faith of the child is not the same as the person they are marrying or married to. If the child is residing with the parents, who themselves are not suspected to be involved in causing, supporting or facilitating the marriage, and where the child is not betrothed to a person from a different religious affiliation, then she may be allowed to stay with her parents, but the matter must immediately be reported to the Court, within 24 hours.

Moreover, Rule 9 of the SCMRR stipulates that the police must search for the child if a report has been made to the Court. Once a child has been taken into custody by the police and the police cannot immediately present the child before the Court, or if the child is of a faith different from the person they are marrying or married to, then they must be placed in a child protection institution for temporary custody in accordance with Rule 10, SCMRR.

A Child Protection Institution is described in Rule 2(b), as a government run facility or a registered voluntary organization that may provide shelter, care, protection, and rehabilitation to a child. The exact location of the child is to be kept discreet and the child may meet her parents, guardians or betrothed but only if the child gives full, free consent to do so.

However, there currently exists no network of government-run or government approved shelters or institutions that may take a child in custody and provide safety and rehabilitation from emotional and/or physical trauma that a child may have suffered. Moreover, if the complainant is not the child itself but is at risk, there is no legal provision that will protect them from the adverse consequences faced because they reported the child marriage.

#### **5.5 How will a Child Marriage Case Proceed?**

Section 6 of the SCMRA stipulates that only the Court of a Judicial Magistrate of First Class shall take cognizance of or try any offence under the Act. Several judgements of Pakistani Courts also state that a Judicial Magistrate of First Class hearing a case of child marriage shall

be acting as the Family Court and hence its primary duty is to adjudicate on the welfare of the child.<sup>228</sup>

Child marriage, if contracted with a child under the age of 16 years and consummated, should then also constitute rape of a minor. Section 375 of the Pakistan Penal Code, 1860 (PPC) states that the age of sexual consent is 16 years, which means that regardless of whether apparent consent was given by a person under the age of 16 years any sexual intercourse with a person under 16 will be considered rape. This legal provision for minimum age of sexual consent itself makes no exception for marriage; that is, the charge of rape is not precluded by the presence or absence of a Nikkah, if the victim of sexual assault is under the age of 16 years.<sup>229</sup>

However, firstly, wherever the accused is able to provide a Nikkah Nama (marriage certificate), the Courts have refrained from convicting an accused of rape, unless it can be proven, without doubt, that the Nikkah was contracted under duress or without consent.<sup>230</sup> Secondly, Rape is a criminal offence which can only be tried by a Sessions Court while a case of child marriage proceeds before the Judicial Magistrate. Therefore, it is important that two separate First Information Reports (FIR) be made to the police or for child marriage to be reported as a private complaint and for the accompanying rape to be reported in an FIR. However, if the First Information Report (FIR) cites both, Section 375, PPC and the SCMRA, then the FIR will have to be bifurcated by the Judicial Magistrate before whom it is presented, and two separate cases would have to be tried in two separate courts.<sup>231</sup> However, there are numerous reported instances where, the police do not know this or fail to ensure that they record the two crimes separately and the Judicial Magistrate has also failed to bifurcate the FIR; instead of bifurcating the FIR and creating two separate proceedings, the Judicial Magistrate has simply discarded the trial one or the other crime.<sup>232</sup>

However, note that the SCMRA does not invalidate the marriage itself, and there are no reported judgements under the SCMRA, as of yet, that read down this provision or hold a child marriage to be invalid and void. The reported case-law generated under the CMRA of 1929 expressly states that while different responsible parties must be penalized, the marriage contracted with a minor is not automatically void, unless the child has not yet attained puberty.<sup>233</sup> A child marriage must be annulled through separate proceedings. Nevertheless, Rule 13 of the SCMRR states that for cases where the child marriage has taken place where one of the spouses is of another religious faith (that is, when forced conversion is likely to have taken place), then the court can, among other things, order that divorce proceedings be expedited.

What is interesting is that an overwhelming majority of the cases reported against the law for child marriages are cases filed by the parents or guardians of a girl, in instances where the girl has eloped. Therefore, the existing case-law rarely addresses the question of a forced marriage. In holding the marriages to be valid, the Courts are presumably responding to the question of independent agency of a woman and granting her relief by holding the marriage to be valid. Nevertheless, this created a difficult path for cases of actual forced marriages when so ever they do present themselves before the Courts.

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<sup>228</sup> P L D 2020 Lahore 811; Section 17 & 20, Family Courts Act, 1964; Section 12 & 17, Guardian & Wards Act, 1890

<sup>229</sup> Sarah Zaman and Maliha Zia, "How Much Rape Is Rape?," in *Disputed Legacies: The Pakistan Papers* (Chicago: UChicago Press- Seagull Books- Zuban Books-, 2019), 155–213.

<sup>230</sup> P L D 2020 Islamabad 28; P L D 2013 Lahore 243

<sup>231</sup> Section 190, 192, 193 CrPC. See also 180, 182, 187 CrPC

<sup>232</sup> Luke Victor, Human Rights Legal Associate, LAS Consultation on the Implementation of the Sindh Child Marriage Restraint Act of 2013, October 28, 2020, Legal Aid Society, Virtual Meeting.

<sup>233</sup> P L D 2013 Lahore 243; 1988 CLC Lahore 113

Because of the jurisdictional issue mentioned in the section on reporting, the victim of a child marriage, and the child sexual abuse that transpired through it, would have to choose between pursuing a rape case and a child marriage case or run in different directions pursuing both.

## **5.6 What are the special provisions for Cases of Forced Conversions?**

The SCMRR also make special provisions as to how a case for such a child is to proceed. Rule 13 of the SCMRR very cogently lays out the special circumstances that must be adopted where the child is threatened by marriage into another faith. These include but are not limited to, having the trial in a different location, keeping the location of the child discreet, taking their statement etc. outside the courtroom, providing the child with police protection or requesting transferring the case to a separate jurisdiction if need be and so forth.

Rule 13 of the SCMRR provides that a child threatened by marriage into another faith must be taken into protective custody and placed under a Child Protection Institution. In the absence of Child Protection Institution, after ensuring the security measures at the shelter, the police may place the child in the custody of Dar-ul-Atfal or an Edhi Shelter or, for Karachi, they may also place the child at the Pannah shelter. While this is not what is provided for in the law, the courts have taken a lenient view towards placing children in well reputed and safe shelter homes, as an alternative to the Child Protection Institutions.

However, Pastor Ghazala, a Christian community leader in Karachi, notes that many of these provisions are not followed. Minority girls are brought to crowded, open courtrooms without any regard for their safety and are regularly subjected to intimidation and threats before, during or after the hearings.<sup>234</sup>

## **5.7 What Happens to a Child After the Court Rules in Their Favour?**

The suffering of a girl child is far from over, even when and if she is released from the marriage. For one, if the marriage has been consummated and she is no longer a virgin, she is now considered "damaged goods" whose "market value" for remarriage is significantly lower.<sup>235</sup> She may no longer be treated as a child because she has lost her innocence.<sup>236</sup> If she has fallen pregnant or contracted a sexually transmitted disease, she needs medical attention and care. It is also unlikely that she will be welcomed back home, regardless of whether she had been forced into the marriage by her own parents, or if she had eloped. Even if she had been abducted, she may still be treated as a polluted liability once she returns home. Her future is uncertain. The following provisions make some attempt to address these concerns.

For the privacy of the victim, Rule 18 of the SCMRR stipulates that the identity and any other personal details of the victim must not be disclosed. Moreover, Rule 19 states that if the situation requires, the custody of such a child may be entrusted to a child protection institution or the Court may appoint a guardian or a suitable person who may look after her till she is 18 years of age. The Court may also send the child to safe custody outside the jurisdiction where she previously resided, in which case the Court of that jurisdiction would be required to oversee her custody in accordance with Rule 20. Moreover, Section 22 of the SCMRA requires that parents of such a child may be required to make payments as child's maintenance.

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<sup>234</sup> LAS Research on the Implementation of the Sindh Child Marriage Restraint Act, 2013: Validation Workshop & Consultation, November 20, 2020, Legal Aid Society, Virtual Meeting.

<sup>235</sup> Sarah Zaman and Maliha Zia, "How Much Rape Is Rape?," in *Disputed Legacies: The Pakistan Papers* (Chicago: UChicago Press- Seagull Books- Zuban Books-, 2019), 155–213.

<sup>236</sup> Carpenter, Belinda, Erin O'Brien, Sharon Hayes, and Jodi Death. "Harm, Responsibility, Age, and Consent." *New Criminal Law Review: An International and Interdisciplinary Journal* 17, no. 1 (2014): 23-54. Accessed January 9, 2021. doi:10.1525/nclr.2014.17.1.23.

It must be noted, however, that no such action has as yet been taken and child protection units are themselves dysfunctional. Moreover, even if a child were placed in such institutions or custody up to 18 years of age, she is unlikely to be able to fend for herself independently once she turns 18, if she has no vocational skill or education or place to stay etc. Additionally, if she also has a child to support or care for, she is unlikely to be able to survive on her own, without significant support from state institutions.

## **5.8 What are the Legally Mandated Infrastructural Securities for the Prevention of Child Marriage (that are Absent)?**

There are several features in the child marriage law, (the SCMRA and the SCMRR), which if implemented could significantly improve the situation. However, there is no budgetary allocation, political will or institutional capacity that would allow such implementation.

Nevertheless, the provisions that do exist are as follows. Rule 23 of the SCMRR states that all child protection institutions must be monitored in accordance with the Sindh Children Act, 1955 and the rules framed thereunder. Then, Rules 24 to 34 stipulate that a representative Provincial Monitoring Committee on Child Marriage shall be established, and it shall conduct research, monitor, update, seek support for and ensure implementation of the SCMRA and SCMRR, as well as record its activities in an annual report.

In addition to this, Rules 35 to 45 stipulate that District Monitoring Committees shall be established by the Women Development Department in each district of Sindh, and a separate desk shall be established in the Women Development Department to facilitate and monitor these committees.

Neither the Provincial Monitoring Committee on Child Marriage, nor the District Monitoring Committees, nor a Secretariat or desk at the Women Development Department of the Government of Sindh has been established. Nor are there any functional child protection institutes that can be monitored under the Sindh Children's Act, 1955.

## **6 How have Child Marriages been perceived and Dealt with in the Courtroom?**

According to the case law available, the issue of child marriages is placed before the High Courts and Supreme Court of Pakistan in four different forms:

- a. as a Habeous Corpus Petition for the production of the alleged child in court and handing over her custody to the parents or husband respectively, filed in accordance with Section 492, Code of Criminal Procedure (CrPC), 1898, either by the parents or the husband of the alleged child bride;<sup>237</sup>
- b. as a criminal complaint filed under Sections 364A (Kidnapping or abducting a person under the [age of fourteen] ), 365 (Kidnapping or abducting with intent secretly and wrongfully to confine person), 365B (Kidnapping, abducting or inducing woman to compel for marriage etc.), 366A (Procuration of minor girl) of the Pakistan Penal Code (PPC), 1860 (criminal complaints of this nature can be filed against Sections 359 – 375 of the PPC, 1860);<sup>238</sup>
- c. as a criminal complaint alleging rape under Section 375 of the Pakistan Penal Code, 1890;<sup>239</sup>

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<sup>237</sup> 2006 Y L R 2936 Lahore; 2006 YLR 2936 LAHORE; 1975 PCRLJ 1049 KARACHI; 1970 PCRLJ 1035 SUPREME COURT; P L D 1970 Supreme Court 323

<sup>238</sup> 2018 P Cr. L J Note 175 Lahore; 2015 P Cr. L J 193 Balochistan; due to the concurrent crimes committed in addition to child marriage, such cases could also be registered under Section 359- 377 of the PPC, 1860.

<sup>239</sup> P L D 2020 Islamabad 28; P L D 2013 Lahore 243

d. as a complaint under the CMRA, 1929.<sup>240</sup>

As a matter of fact, (a) at the time of writing, there are no reported cases under the SCMRA, 2013, in the law journals of Pakistan; (b) most available case law shows that the law against child marriage is invoked when the parents initiate action against their children (mostly daughters) for having married according to their will, and (c) the remaining cases of child marriage are instituted by parents when their child has been subjected to a forced conversion to Islam and married to a Muslim before they are of an age where they can legally consent to marriage, or to a change of faith.

In all of the reported judgements that pertain to child marriage, there is not a single case where an underage person being forcibly married by their parents or elders have managed to find a way to Court. This is extremely telling, particularly because a bare reading of the law reveals that it is primarily geared towards preventing forced child marriages arranged by parents, guardians or elders. However, a bare reading of the law also reveals that the reporting mechanisms are such that only mobile and independent members of the community or society may report a child marriage. As mentioned in Section 5 of this paper above, a complaint may be made to the police or to the judicial magistrate. Many of the more remote areas of Sindh where child marriage, arranged by parents or elders is common, do not even have functional post boxes and have low literacy so it is unlikely that a child or a woman or other sympathizing adult will even know to or be able to post their complaint.

Moreover, seeing as, so far, the Courts have only been presented with instances of child marriage where the marriage has taken place according to the will of the child (and against the wishes of their parents) and/or instances of forced conversion, the main question that judges have to address is how to cognize consent. Consent is complicated by multiple factors. Firstly, in a cultural environment where it is normal, particularly for girls to have their marriage arranged before they turn 18 years; and secondly the women's consent is commonly not sought when their marriage is arranged, should the Court penalize underage marriage, or should it uphold the right to marry by choice?

Regarding the question of consent, the Honourable Federal Shariat Court has held as follows:

*8...Therefore, plea of accused/appellant has no legal value or weight that Mst. Parveen Akhtar contracted her Nikah with accused appellant with her free consent, which renders the commission of intercourse with the victim by the accused/appellant within the mischief of definition of zina-bil-jabr. I have considered this aspect of the matter very anxiously. Although the accused/appellant claimed that he performed Nikah with Mst. Parveen Akhtar with her free consent, but the victim was only about 16 years of age, at the time of her medical examination, which took place about one and half years after the alleged abduction and alleged Nikah, i.e. she had not attained legal capacity as major under the Child Marriage Restriction Act 1929, ...On the other hand, the accused/appellant was more than 44 years of age and he could well be of the age of her father. In such a circumstance, the question of free consent and intelligent choice of the girl did not arise.*

*9. Awareness about marriage encompasses more serious matters than mere carnal knowledge (relating to physical feelings and desires of body). Therefore, Islam places conjugal consent over high pedestal of morality rather than carnality. Consequently consenting adult is a person who has come of age enough, and therefore responsible enough, to decide and understand consequences of marriage.*

<sup>240</sup>P L D 2013 Lahore 243; 2008 Y L R 1595 Karachi; 2008 YLR 1595 KARACHI; 1988 CLC 113 LAHORE; 1970 PLD 323 SUPREME COURT; 1964 PLD 630 DHAKA; 1962 PLD 442 KARACHI

10. Marriage involves a consent which is quite distinct in definition and in differentiation from all types of other consent, e.g., common consent, mutual consent, or implied or express consent. Consent for marriage is eloquent and declaratory, being more specific and expressive. Consent for marriage has deeper and wider implications for criminal, civil, and family laws, e.g., inheritance, etc. Therefore, free consent, for marriage, does not mean just acceding to or saying 'yes' to the circumstantial or situational dictate. While analyzing quality, value or worth and features of such a free consent, following need to be considered.

- Ability of exercising free choice:
- capacity (legal capacity: not only sane, but mature mind, i.e., not only puberty, mere majority but age of responsive and conscious consent),
- capability to use that capacity,
- depending upon capacity, impediments to or assistance available for application of mind e.g., availability of assistance of wali and wakil (guardian-counsel and supporter-protector),
- in one's own interest or benefit,
- extent of free availability of possible options to choose from,
- environ of freedom.

Because of such an importance, its registration as formal 'Nikahnama', not mere notarization, is essential, in the interest of concerned individuals, family and society, which leaves no room for admission of mere oral assertion or averment, particularly by one party when the other party vehemently denies it.

11. According to the Ordinance No. VII of 1979, The Offence of Zina (Enforcement of Hudood), the definition of the term "Zina-bil-jabr", specified under its section 6 is reproduced as under:--

"6. Zina-bil-Jabr (1) A person is said to commit zina-bil-jabr if he or she has sexual intercourse with a woman or man, as the case may be to whom he or she is not validly married, in any of the following circumstance, namely: --

- (a) against the will of the victim;
- (b) without the consent of the victim;
- (c) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt, or
- (d) with the consent of the victim, when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to whom the victim is or believes herself or himself to be validly married."

In the circumstances of the case, it shall, therefore, be seen that even if alleged consent of victim was obtained by putting her in fear, it was not a free consent and freely considered choice for the Nikah but it (the Nikah itself) would be under duress and coercion and any sex offence committed against the victim Mst. Parveen Akhtar would be that of zina-bil-jabr and not a validly permissible performance of conjugal right. The accused was a man of advanced years, and the victim was quite a young girl under 16 years of age, at the time of occurrence. She could neither avail of the opportunity of well-considered assistance and advice of parents or wali, nor

*was she herself so well-educated and enlightened to safeguard against the decoy and exercise her free-will to give a valid consent.*"<sup>241</sup>

However, in the same judgement, the Court has acknowledged that the convict was legally required to be given life imprisonment but was given only ten years rigorous imprisonment by the trial court. Nevertheless, has held that: *"The extenuating and mitigating circumstances, and the fact that family of the appellant, particularly his [first]wife, Mst. Aasia, [Co-accused in the trial at the lower court, for misleading the victim into the street where the accused abducted the victim] have also been made to suffer for no fault of theirs, and continuing the separation of the accused would make life of entire family more miserable than his own life imprisonment, along with the fact that no petition has been filed by the complainant for enhancement of the sentence of 10 years' Rigorous Imprisonment, awarded by the learned trial Court need to be considered. ...[20.] In this view of the matter and on consideration of the extenuating and mitigating circumstances the sentence of the appellant, has appropriately been reduced, on both counts from 10 years' R.I. to the one having been already undergone. [21.] Appellant, Muhammad Aslam, is in jail. He be released forthwith if not required in any other custody case."*<sup>242</sup>

We need to think about this apparent discrepancy between the Court very cogently delineating the reasonable parameters of consent and creating very important precedent in this matter; and on the other hand, reducing the sentence of the convict.

The next line of questions and concerns is as follows:

- (a) In a religious environment where marriage is permissible as soon as a girl attains puberty;
- and (b) There is a real and pervasive threat of violent public backlash against the Courts if they are perceived to be threatening or voiding any practice that has religious coloration (such as a religious conversion or underage marriage);
- (c) There is no legal minimum age for change of religion;
- (d) The law against child marriage has no express provision that states a child marriage is automatically invalidated or void ab initio;
- (e) How safely can the Court penalize the willing participants of a child marriage and/or forced conversion?
- (f) Is there a concerted judicial (and political) will to enforce the law against child marriage?
- (g) There a concerted judicial (and political) will to protect citizens against forced and/or underage conversions? The Courts of Pakistan have expressed the following opinions.

By and large, the Courts have held in favour of marriages by choice, even if they are underage marriages, and declared them valid;<sup>243</sup> and the Courts have upheld the religious right to marry once a girl has attained puberty.<sup>244</sup>

However, Courts have shown a clear intent to enforce the law against child marriage. Even whilst holding that underage marriages are valid marriages, the Courts have expressed clarity in their support for the CMRA, 1929 (and corollary for SCMRA 2013). However, perhaps because most litigants were litigating against marriages by choice, and after the age of puberty, Courts have not consistently penalized child marriages. Moreover, over the years

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<sup>241</sup> Para 8- 11, 2012 P Cr. L J Federal Shariat Court 11; Jibran Nasir, Advocate High Court, Key informant interview dated December 22, 2020

<sup>242</sup> Para 18- 21, 2012 P Cr. L J Federal Shariat Court 11

<sup>243</sup> PLD 2005 Lahore 316; 2008 Y L R 1595 Karachi

<sup>244</sup> 1994 SCMR 2102

Courts have variably interpreted the age at which a girl is deemed to have attained puberty—from the age of 9 years,<sup>245</sup> to the age of 15 years<sup>246</sup> to the age of 18 years<sup>247</sup>.

*[6.] Under the Muslim Law the competence of a girl to enter into a contract of marriage is dependent on the attainment of puberty. Puberty is presumed at the age of fifteen years. According to 'Fatawa Alamgiri', Page-93 of Vol-V, the lowest age of puberty according to its natural signs, is 12 years in males and 9 years in females and if signs do not appear, both sexes are held to be adult on the completion of their age of 15 years. The principle which after copying out from Fatawa Alamgiri and Hedaya can be deduced is that a girl even having not attained puberty but possessing discretion and sufficient understanding can enter into a contract of marriage however for its operation it will be dependent on the consent of the guardian, if there is one, but in the absence of any guardian it will take effect on her attaining of majority and ratifying the contract. According to Paragraph-274 of Mahomedan Law, "when a marriage is contracted for a minor by any guardian other than the father or father's father, the minor has the option to repudiate the marriage on attaining the puberty. This is technically called the "option of puberty" (Khyar-ul-bulugh). The right of repudiation of the marriage is lost, in the case of a female, if after attaining puberty and after having been informed of the marriage and of her right to repudiate it, she does not repudiate without reasonable delay. The Dissolution of Muslim Marriages Act, 1939, however, gives her the right to repudiate the marriage before attaining the age of eighteen years, provided that the marriage has not been consummated. But in the case of a male the right continues until he has ratified the marriage either expressly or impliedly as by payment of dower or by cohabitation"... [8.]While adopting a progressive approach for relieving the society from the harmful effects of prevalent child marriage, it indeed undertook a commendable legislative business in the form of the Child Marriage Restraint Act, 1929 (Act XIX of 1929). It appears that without directly meddling with above described position discussed in para No.6 of this judgment regarding which age limit of marriage under the Muslim Personal Law, the provisions of Act 1929 have expediently and objectively been framed to hold male adult i.e. marriage contracting party about 18-years of age liable for punishment along with the other persons including the parents and guardians, who perform, arranged, conduct or direct any child marriage. A deterrence of punishment for violation of the provisions has been created. It is quite vivid that the act does not hold the minor responsible for violation of the provision of the Act 1929. It also does not invalidate the marriage itself... It is a matter of great concern that despite ninety years of the promulgation of the Act, 1929, its objectives could not have been achieved satisfactorily due to certain lapses or loopholes in the mechanism for its enforcement. The children are still being lured by unscrupulous elements through deceitful means to abuse their innocent souls. It is also relevant to point out that although under The Majority Act, 1875 (Act XX of 1875) (hereinafter known as 'Majority Act') a person is said to attain majority at the age of eighteen years. However, in case of appointment of his guardian by the Court, the age of majority of such a Ward is twenty-one years. The application of the above provisions has however been excluded insofar as the operation of personal law in respect of marriage, divorce and dower is concerned...Child is the future asset of a family, a nation and the world at large, respectively.[9.] Poverty and cultural barriers put constraints on women*

<sup>245</sup> "All original texts of Hanafi Jurisprudence are unanimous on point that 9 years minimum age on which declaration of a girl about her puberty can be accepted." (1994 SCMR 2102);

<sup>246</sup> "section 13 of Muslim Family Laws Ordinance 1961, in clause (VII) of section 2 of Act No.VIII of 1939 (Dissolution of Muslim Marriages Act 1939), the word '15' was substituted by the word '16'. This amendment, however, does not lay down that the female attains puberty at that stage only. It simply enables a girl to exercise the option of puberty when she attains the age of 16 years, whereas, in accordance with the unamended clause (VII), if given in marriage before a female attained 15 years, she could exercise her right of option of puberty after attaining the age of 15 years and before reaching the age of 18 years provided the marriage was not consummated." 1988 CLC 113 LAHORE; See also PLD 1975 Lahore 234

<sup>247</sup> P Cr. L J Federal Shariat Court 11

from having their say regarding their marriage decisions specifically in the traditional and parochial societies. Early age marriages can have severe consequences to the life of a female and pose serious personal and social problems ranging from health issues to social mobility. Women who marry earlier in age are more likely to bear child at younger age and are more exposed to prolong domestic violence. Similarly, women marrying at younger ages tend to have less education, less economic opportunities, lower level of social mobility and poor access to health services. The denial of opportunity for an adequate education would amount to denial of opportunity to succeed in life. Early marriage does not only restrict women from socio-economic opportunities, but also affects their reproductive health status such as forced sexual relations, early and complicated pregnancies, higher fertility rate and large family size formation.... Physically, child bride has small pelvis and are not prepared for childbearing. It results in deliveries that are too early or late. This exposes them to different complications. High mortality rates are due to postpartum hemorrhage, sepsis, obstructed labor and HIV transmission. Besides that, they are also at risk of acquiring Sexually Transmitted Infection and Cervical Cancer. To prove their fertility, they go for high frequency and unsafe intercourse with their old age polygamous spouse. Conjointly, the adolescent mother produces less breast milk or colostrum, which makes their child susceptible to infection. After marriage, girls are brought to their husband's place, where they have to play the role of wife, domestic worker, and ultimately a mother. Their husband may also be polygamous due to which they end up in burdensome situation and feel isolated, rejected, and depressed. Literature suggests that age differences and the poor communication may lead to divorce or separation. Also, their children are more likely to report a stressful life and notably more psychiatric disorders. Socially child brides are unable to look after their families because they have less authority and control over their kids, and have less capability to become decisive about their housing management, nutrition and health care. With that most of wives have never gone to school or left school early, making them dependent on their spouses in practical life .... [15.] In addition to what has been discussed in the preceding paragraph, it is observed that due to child marriage, the possibilities/ chances/likelihood of infringement of fundamental rights of a child which have duly been guaranteed by the Constitution of Islamic Republic of Pakistan, 1973 are enhanced. As referred hereinabove, that the right of life is not a mere right to exist or live, it also encompasses the idea of leading a meaningful and dignified life. Offering of an opportunity to get education by the state is also a fundamental right of a minor, denial whereof would amount to denial to excel and progress in life. The education enlightens the soul of a human being. Besides shedding positive effects on his body, the education also refines human behavior. Examining this proposition while seeing it through the prism of rule "loco parentis" is observed that the paramount consideration before the Courts has always been the welfare and betterment of a minor. The Courts always act in loco parentis position while keeping in view a variety of considerations. A formalistic approach commonly associated with the adjudication of adversarial civil disputes may not be conducive to the exercise of parental jurisdiction by this Court. A more proactive role shall have to be adopted so as to ensure the protection of the best interest of the minor. The expression welfare shall have to be construed in a way as to include in its compass all the dominant factors essential for determining the actual welfare of the minor/child with a progressive outlook enabling him to prove as a useful entity. Technicalities of law are not supposed to circumvent the exercise of jurisdiction and powers by the Courts in dealing with the matters pertaining to the minor/child. All courts are therefore, supposed to exercise their jurisdiction proactively to forestall any endeavor to cause a breach to the fundamental rights of the children, the protection/provision of which essentially is also in the welfare of the minor/child. Therefore, I feel it appropriate to hold that whenever it comes to the notice of a Court that prima facie a case of breach of fundamental rights of the minor is made out, the Court, in case of failure of the Union Council in moving a complaint before the Court, while adopting a proactive role in "loco parentis" should, without any hesitation, pass an

*appropriate order directing the Union Council to send a requisite complaint before the competent Court that a marriage has been contracted in violation of the provisions of the Child Marriage Restraint Act, 1929.*

—Paragraph 6,8,9, 15 of P L D 2020 Lahore 811<sup>248</sup>

However, prior to 2006, the Courts have held that a child or woman cannot be deemed to have been raped, if the girl has attained puberty and there exists a Nikah Nama that solemnizes the marriage: *"In the same terms it may be held that performance of conjugal rights by the spouses, even though the girl may be below the age of sixteen years but has attained puberty and is also consenting party to such marriage, cannot be termed as "unlawful sexual intercourse" so as to attract section 375, P.P.C. in order to initiate proceedings against them."*<sup>249</sup> Therefore, there existed a very real threat that a child is forcibly married to her rapist, to protect a (pedophilic) rapist, since marital rape has not yet been explicitly recognized by the courts in Pakistan.

The Protection of Women (Criminal Laws Amendment) Act, was passed in 2006 and through this Act, there was an amendment to Section 375 of the Pakistan Penal Code, 1860, which defines the crime of rape. In the amended articulation of Section 375, the impunity for rape which was earlier afforded to a husband, was no longer granted. Moreover, Section 493A was inserted into the PPC, 1860, and this criminalized "cohabitation caused by a man deceitfully inducing the belief of a lawful marriage". In addition to this, Section 496A was also inserted through the 2006 Act; this criminalized "enticing or taking away or detaining with criminal intent a woman...that she may have intercourse with him".

Since the passage of the 2006 Act, there have been no cases reported in the law journals where a Nikahnama has been held as a valid defense for rape of a child.

Moreover, in same vein, the Honourable Supreme Court of Pakistan has earlier held (albeit whilst delineating on a different aspect of marriage) that *"See Ibn Abidin: Raddul-Muhtar, Vol. 2, p.482 and secondly, because even if is held to be irregular, it is still an invalid marriage, for both the irregular (Fasid) and void (Batil) marriages fall in the category of 'invalid marriage'. (See Ibn Abdin Vol. 2, p. 835)."*<sup>250</sup>

When such cases are presented before them, it is imperative for Courts to remain cognizant of three things: first, sexual consent, which may be given at the age of 16 is equivalent to consent to marry, as defined and described by the Federal Shariat Court,<sup>251</sup> second, the fact that a Nikah Nama is not a defense for rape; and a child marriage due to its being irregular is also invalid under Islamic law.<sup>252</sup>

In addition to this, where a change of religion accompanies an alleged marriage by choice, the Courts are forced to take the question of consent more seriously and determine whether or to what extent a minor can be deemed to have consented to their marriage and/or change in religion. In the recent years, several community leaders, legislators and civil society activists have raised the issue of forced conversions in conjunction with child marriages, as described in Section 4 above. As a result, Courts have also become more conscious of the fact that many non-Muslim minor girls are either abducted or manipulated and exploited such that they convert to Islam and marry (adult) Muslim men. For the first time, in July 2020, despite the fact that the girl in question had attained puberty, the High Court of Sindh held

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<sup>248</sup> P L D 2020 Lahore 811

<sup>249</sup> Paragraph 5, P L D 2013 Lahore 243

<sup>250</sup> Paragraph 22, 1992 S C M R 1273

<sup>251</sup> P Cr. L J Federal Shariat Court 11

<sup>252</sup>Jibran Nasir, Advocate High Court, Activist and Politician, Key Informant Interview, 20<sup>th</sup> December 2020, Karachi

that the conversion and marriage of a 15 year old Hindu girl to a Muslim man was to be held in abeyance till the girl turned 18 years old and in the meanwhile her custody was granted to the parents (with whom she expressed interest in residing, despite stating that she had initially contracted a marriage with a Muslim man).<sup>253</sup>

In another Instance, where a 17 year old Christian girl was in a similar situation, the Court sent the girl in question to a shelter home until she turned 18 years old and could decide if she intended to stay in the marriage.<sup>254</sup> In yet another instance, where the case involved a 14 year old Christian girl and a 44 year old Muslim man, where the girl appeared in Court and gave a statement that she was 18 years old and was in love with and willing to stay with her alleged husband, the Court went the diligent extra mile, and did not accept the documents which stated she was 14 years old, even though they were records of NADRA, the Church or the school which the girl used to attend, but ordered a bone ossification test to determine the age of the girl. Once it was ensured that the girl was indeed 14 years old, the Court determined that she was too young to have decided on her marriage and, since she expressed unwillingness to return to her parents' home at the time, therefore she must be placed in a shelter.<sup>255</sup>

Based on the several cases discussed above, there appears to be a clear trajectory that is being followed by the higher judiciary of Pakistan, particularly in Sindh.<sup>256</sup> The judgements are cogent and aware of the grave consequences of child marriage and of forced conversions which often accompany child marriages in Sindh. However, based on the existing case law, as described above, it is possible for the Courts to also hold that a child marriage may be deemed invalid as soon as it is proven to be a child marriage, because it is not possible for a child to give full, free, informed consent to marriage and marriage cannot take place without consent. Alternatively, Rule 13 of the SCMRR 2016 also empowers the Courts to order expedited divorce proceedings in cases where the parties to a marriage are from different faiths, so if the Courts choose not to declare the marriage invalid, they may order expedited divorce proceedings. Courts may also take cognizance of the crime of rape having been committed and order for the accused to be prosecuted for rape. There is clear hope that the Courts will continue to play an increasingly active role towards preventing and curtailing child marriages and protecting the children of the province and the country whilst remaining mindful of the complications arising out of free will marriages, the possibility of backlash and punishment from families, forced conversions and so forth.

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<sup>253</sup> Order dated: 09.07.2020 passed by the Honourable High Court of Sindh in Constitutional Petition No. D-3105 of 2020

<sup>254</sup> Order dated: 13.11.2020 passed by the Honourable High Court of Sindh in Constitutional Petition No. D-2747 of 2020

<sup>255</sup> Order dated: 23.11.2020 passed by the Honourable High Court of Sindh in Constitutional Petition No. D-5364 of 2020

<sup>256</sup> APP Desk, "SHC Orders Enforcement of Law on Child Marriage," Pakistan Today, July 1, 2017, <https://archive.pakistantoday.com.pk/2017/07/01/shc-orders-enforcement-of-law-on-child-marriage/>.

## **7 Gap between Knowledge and Action: Findings and Recommendations**

The most important finding that has come to the fore as a result of this study is that the conversation regarding child marriage, as it usually occurs in law & policy circles is severely sterilized and often disregards the convoluted economic, social, cultural and bureaucratic veins by which the practice of child marriage is embedded in society and the services and disservices it contributes to society. Secondly, it is important to note that the existing law against child marriage is mostly used to target young girls who have married according to their wish and against the wishes of their parents, and is almost never used to target those children who have been forced into under-age marriages. Thirdly, the existing law is toothless because (a) it does not provide realistic mechanisms for reporting by a child affected; (b) if a person is found guilty of being party to, for facilitating or for arranging a child marriage, it does not invalidate the marriage itself; (c) it does not provide for an adequate safe space to place a child who has been rescued from a child marriage and (d) it does not differentiate between a child closer to the age of majority, who has married someone according to their wishes and a child who has been forced into a marriage. Fourthly, it is important to understand that the present constellation in which the State is absent, and present, is detrimental and harmful as opposed to being beneficial. That is, the State is present in legislating against child marriage and passing the SCMRA 2013; however, is absent insofar as it provides no real infrastructure for the rescue and safety of a child from marriage, nor does it invalidate the marriage nor prevent the misuse of the law for policing young persons' sexuality, mobility, and freedom of choice. Fifthly, the SCMRA 2013 does not adequately problematize, among others, the notions of childhood, or consent or freedom of choice or access to justice (in that the child cannot directly report or litigate their case without the support of an adult). Sixthly, the SCMRA 2013 sits uncomfortably at the heart of the conflict between the writ of the State versus customary practices. The issue of child marriage forces the modern nation state of Pakistan, bound by liberal human rights norms, to confront the religious beliefs, customary practices, and traditional forums for justice (such as Jirgas that may give a girl child in marriage to create a truce between warring tribes or families, as discussed above).

In summary, in its present form and implementational infrastructure, it is clear that the existing law is little more than an aspirational placeholder. It neither affords actual victims of child marriages to report freely and safely, nor provides them with safety if they manage to report a child marriage. It is also obtuse insofar as it does not recognize the myriad types of and reasons for marriage, at an age earlier than eighteen, as discussed above. The existing law does not respond to the way in which society is organized and functions. As a result, the law has become a tool for parents and patriarchs looking to prevent young girls from marrying as per their own choice whereas those who are forcing young children into marriage are going scot free. Because it fails to, or intends not to, provide adequate mechanisms to eliminate child marriage, the law is not effectively usable in its present form. It is not only safety and child protection infrastructure that is missing but a legislative, political, judicial and bureaucratic will to eliminate the various reasons why child marriage persists—such as widespread and violent anti-women practices, large number of stateless persons and questionable national registrations laws, widespread and violent religious discrimination, unchecked powers of (self- proclaimed) Islamic clergy and other evangelical figures coupled with the non-consolidation of state monopoly over violence, inability to provide universal basic education and employment opportunities- particularly to women, inability to provide safe or, for that matter, any comprehensive public transport and so forth.

At present, even the very purpose of the law, that is to curb child marriage, does not have popular consensus. Those who oppose child marriage in political and policy circles either remain in their echo chambers when laws are drafted or, more likely, are aiming to appease

both—international and liberal norms, and traditional and religious norms. As a result, the law has remained ineffective.

Instances when the law has encountered stark societal and cultural realities is when it has been misused by parents and guardians attempting to punish their children for having married according to their will. Due to this, judges have had to respond accordingly and have frequently secured the choice of the children over the authoritarianism of the parents. Secondly, the judiciary has also had to balance the contradictory Constitutional aspirations of being an Islamic state and abiding by liberal norms. As a result, justice that has been served has been largely discretionary, and often problematic. For example, the SCMRA or SMRA make no reference to puberty but various judgements repeatedly rely on Muhammadan law and use the yardstick of puberty to determine whether the marriage being adjudicated upon is valid or not. Thirdly, the judiciary, as any other branch of the State of Pakistan is ever aware that the state effectively shares its monopoly over violence with the religious sentiment in the country and there is an ever-present risk of mass rioting or other law and order problems if religious sentiment (based on specific interpretations that allow for patriarchal and political control) is offended.

An important purpose this law can serve is as a tool for rally against forced, early child marriage and for improved educational, economic, and social opportunities for women and girl children. If the law were implemented in its fullest, many communities would be further marginalized and alienated, unable to seek protection in marriage as described above. Many patriarchs and/or parents would be facilitated in exerting complete control over their children's choice in marriage, denying their bodily and sexual autonomy, and maintaining status quo. If child marriage is not regulated at all, girl children will remain particularly susceptible to health risks, maternity death, and denied educational, economic, and socio-cultural opportunities. Therefore, the existing law can neither be endorsed in its present form and use, nor can it be denounced in its entirety. It must be used as a rallying point around which a basic infrastructure can be set up.

### **Immediate Practical Recommendations**

Two main budgetary allocations are proposed:

- Reporting by young women and girls needs to be encouraged through targeted campaigns in schools, villages, television and mobile phones and a telephonic helpline, manned by child health experts, child psychology experts and lawyers, which can be called for immediate response in a child marriage case need to be established. The existing LAS helpline run in partnership with the Law Department of the Government of Sindh, could set up a child marriage desk.
- Child protection institutions need to be set up, made functional and safe. The existing Shaheed Benazir Bhutto Human Rights Centers for Women (Crisis Centers) which have been established (albeit not popularly used) in the province of Punjab, can be used as prototypes.<sup>257</sup>

### **Proposed Amendments to the rules**

- All Nikah Khuwans must maintain a record of all Nikahs conducted and must submit the same to the Nikah Registrar on a monthly basis who must then (a) ensure that all persons married were of age and (b) follow up on the registration of the marriages
- All Nikah Khawans must be registered subject to annual renewal whereby any offences of child marriage must be placed in the record of an offending Nikkah Khawan

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<sup>257</sup> [https://swd.punjab.gov.pk/crisis\\_centres](https://swd.punjab.gov.pk/crisis_centres)

- Amend the rules to differentiate between marriages contracted: (a) after the age of sexual consent i.e., 16 years old and (b) between partners of ages between 7 years of each other.
- Each child marriage contracted between an adult and a child less than the age of 16 shall be void
- Resolve jurisdictional issues such that that the sessions court can simultaneously hear a complaint of child marriage and rape of a minor
- Strengthen laws against pedophilia and child sexual abuse so that the law against child marriage (and in confrontation with Muslim Personal Law) does not have to bear the full burden of curtailing the practice of child marriage
- Issue orders under Section 12 of the Child Marriage Restraint Act to each District Commissioner to function as an ad hoc District Monitoring Committee, until the funds and infrastructure of District Monitoring Committees are released

## Annexure A

| <b>Participants of Consultation dated 28<sup>th</sup> October 2020</b> | <b>Expertise/Designation</b>   |
|--|--|
| Ms. Shizza Malik   | Sindh Commission on The Status of Women  |
| Ms. Khadija Ali  | KAALC (Khadija Ali - Advocates and Legal Consultants)                                  |
| Mr. Luke Victor  | Law Associate of Church of Pakistan, Jibran Nasir                                      |
| Ms. Aamna Latif  | Manager Communications - Aahung  |
| Ms. Sarah Zaman  | Gender and Child Rights Expert   |
| Ms. Uzma Noorani   | Co-Chairperson - Human Rights Commission of Pakistan, Managing Trustee- Pannah Shelter |
| Mr. Sohail Warraich  | Member - National Commission on the Status of Women - NCSW, Gender and Law Expert      |
| Ms. Nuzhat Shirin  | Chairperson - Sindh Commission on the Status of Women                                  |

| <b>Participants of Consultation dated: 20<sup>th</sup> November 2020</b> | <b>Expertise/Designation/Stake</b>   |
|--|--|
| Dr. Habiba Hasan   | Member National Commission on the Status of Women                                      |
| Ms. Fauzia Masoom  | Director Operations - Sindh Child Protection Authority                                 |
| Mr. Muhammad Ali   | Team Leader - SRSO   |
| Mr. Abdul Rahman Alias Mairaj  | UET Lahore   |
| Mr. Zuhaib Ali   | Field Supervisor - Benazir Income Support Programme, Larkana                           |
| Ms. Anis Haroon  | Member - National Commission for Human Rights  |
| Ms. Pastor Ghazala Shafique  | Church of Pakistan - Holy Trinity Cathedral  |
| Ms. Neha Pervez  | Child Marriage and Forced Conversion survivor  |
| Ms. Najma Ayub   | Cousin of Child Marriage and Forced Conversion Survivor                                |
| Ms. Rita Masih (Arzoo's Mother)  | Parent of Child Marriage and Forced Conversion Survivor                                |
| Mr. Raja Masih (Arzoo's Father)  | Parent of Child Marriage and Forced Conversion survivor                                |
| Mr. Sohail Waraich   | Member - National Commission on the Status of Women - NCSW , Gender and Law Expert     |
| Ms. Uzma Noorani   | Co-Chairperson -Human Rights Commission of Pakistan; Managing Trustee - Pannah Shelter |

| <b>Participants of Consultation workshop with Parliamentarians</b> | <b>Designation</b>  |
|--|---|
| Mr. Bilal Ahmed Ghaffar  | Member Provincial Assembly Of Sindh   |
| Ms. Nuzhat Shirin  | Chairperson - Sindh Commission on the Status of Women                               |
| Ms. Adeeba Hassan  | Member Provincial Assembly Of Sindh PTI   |
| Ms. Mangla Sharma  | Member Provincial Assembly Of Sindh MQM P)  |
| Mr. Veerji kolhi   | Special Assistant to CM Sindh for Human rights Department Government of Sindh - PPP |
| Ms. Nida Tanveer   | Assistant Coordinator - HRCP  |
| Ms. Sidra Imran  | Member Provincial Assembly Of Sindh   |
| Mr. Kaleem Durrani   | Regional Coordinator - HRCP   |
| Mr. Abu Bakar Ahmed Madani   | Additional Secretary - Social Welfare dept. Government of Sindh                     |
| Ms. Zahida Detho   | Executive Director - Sindh Rural partner Organization                               |
| Ms. Rubina Brohi   | Member Child Protection Authority/ PCSW   |
| Ms. Ghazala Sial   | Member Provincial Assembly of Sindh - PPP   |
| Ms. Sarwat Fatima  | Member Provincial Assembly of Sindh - TLP   |
| Ms. Nida Khuhro  | Member Provincial Assembly of Sindh - PPP   |
| Mr. Justice Khilji Arif Hussain (Retd.)                            | Retired Judge of the Honourable Supreme Court of Pakistan                           |
| Dr. Habiba Hassan  | Member National Commission on the Status of Women                                   |
| Ms. Tanzila Qumbarni   | Member Provincial Assembly of Sindh- PPP  |
| Mr. Badar Jamil  | Secretary - Ministry of Human Rights  |
| Ms. Sahina Shar Ali  | Member Provincial Assembly of Sindh- PPP  |
| Ms. Sadia Javaid   | Member Provincial Assembly of Sindh- PPP  |

## Annexure B

### The Sindh Child Marriage Restraint Act, 2013 Sindh ACT NO. XV OF 2014

PROVINCIAL ASSEMBLY OF SINDH  
NOTIFICATION  
KARACHI, THE 11<sup>TH</sup> JUNE, 2014

NO.PAS/Legis-B-25/2013-The Sindh Child Marriages Restraint Bill, 2013 having been passed by the Provincial Assembly of Sindh on 28<sup>th</sup> April, 2014 and assented to by the Governor of Sindh on 10<sup>th</sup> June, 2014 is hereby published as an Act of the Legislature of Sindh.

THE SINDH CHILD MARRIAGES RESTRAINT ACT, 2013  
SINDH ACT NO.XV OF 2014

AN  
ACT

to restrain the solemnization of child marriages.

**WHEREAS** it is expedient to restrain the solemnization of child marriages. **Preamble.**

It is hereby enacted as follows:-

1. (1) This Act may be called the Sindh Child Marriages Restraint Act, 2013. **Short title and commencement.**

(2) It shall come into force at once.

2. In this Act, unless there is anything repugnant in the subject or context – **Definitions.**

- (a) "child" means a person male or female who is under eighteen years of age;
- (b) "child marriage" means a marriage to which either of the contracting party is a child;
- (c) "Code" means the Code of Criminal Procedure, 1898 (No. V of 1898);
- (d) "contracting party" to marriage means either of the party whose marriage is, or is about to be solemnized;
- (e) "Court" means the Court of a Judicial Magistrate of First Class;
- (f) "Government" means the Government of Sindh.

3. Whoever, being a male above eighteen years of age, contracts a child marriage shall be punished with rigorous imprisonment which may extend to three years but shall not be less than two years and shall be liable to fine. **Punishment for male contracting party.**

4. Whoever performs, conducts, directs, brings about or in any way facilitates any child marriage shall be punished with rigorous imprisonment which may extend to three years but shall not be less than two years and shall also be liable to fine, unless he proves that he had reason to believe that the marriage was not a child marriage. **Punishment for solemnizing a child marriage.**

5. (1) Where a parent or guardian or any other person in any capacity, lawful or unlawful, does any act to promote the child marriage or permits it to be solemnized, or fails to prevent it negligently, from being solemnized, shall be punished with rigorous imprisonment which may extend to three years but shall not be less than two years and shall also be liable to fine. **Punishment for parent or guardian concerned in a child marriage.**

(2) For the purposes of this section, it shall be presumed, until contrary is proved, that where a child has been contracted into a marriage, a person having charge of such child failed to prevent the marriage from being solemnized.

6. Notwithstanding anything contained in section 190 of the Code, no court other than the Court of a Judicial Magistrate of First Class shall take cognizance of or try any offence under this Act. **Jurisdiction under this Act.**

7. (1) Notwithstanding anything to the contrary contained in any other law, the court may, if satisfied from information laid before it through an application that a child marriage in contravention of this Act is going to be arranged or is about to be solemnized, issue an injunction prohibiting such marriage. **Power to issue injunction prohibiting marriage in contravention of this Act.**

(2) No injunction under sub-section (1), shall be issued against any person unless the Court has previously given notice to such person, and has afforded him an opportunity to show cause against the issue of the injunction. The Court may dispense with notice if deemed necessary.

(3) The Court may, either on its own motion or on an application of any person, rescind or alter any order made under sub-section (1).

(4) Where an application is received, the Court shall afford an opportunity of appearing before it either in person or by pleader; and if the Court rejects the application wholly or in part, it shall record in writing its reasons for so doing.

(5) Whoever, knowing that an injunction has been issued against him under sub-section (1) of this section, disobeys such injunction, shall be punished with imprisonment of either description for a term which may extend to one year or fine or with both.

8. Notwithstanding anything contained in the Code, an offence punishable under this Act shall be cognizable, non-bailable and non-compoundable. **Offence to be punishable and triable.**

9. The Court shall on taking cognizance of a case proceed with the trial and conclude the case within ninety days. **Cognizance, trial and conclusion of the case.**

10. Government may, by notification in the official Gazette, make rules for carrying out the purposes of this Act. **Rules.**

11. No suit, prosecution or other legal proceedings shall lie, against any person in respect of anything which is in good faith done or intended to be done under this Act. **Indemnity.**

12. If any difficulty arises in giving effect to any of the provisions of this Act, Government may make such order, not inconsistent with the provisions of this Act, as may appear to Government to be necessary for the purpose of removing the difficulty. **Removal of difficulty.**

13. (1) The provisions of the Child Marriage Restraint Act, 1929, relating to the Province of Sindh are hereby repealed. **Repeal and saving.**

(2) Notwithstanding the repeal of the Child Marriages Restraint Act, 1929, all orders made, decisions taken, judgment passed by any Court, shall be deemed to have been validly made, taken and passed under this Act.

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**BY ORDER OF THE SPEAKER  
PROVINCIAL ASSEMBLY OF SINDH**

**G.M.UMAR FAROOQ  
SECRETARY  
PROVINCIAL ASSEMBLY OF SINDH**

# Annexure B1

## The Sindh Child Marriage Restraint Rules, 2016



GOVERNMENT OF SINDH  
WOMEN DEVELOPMENT DEPARTMENT  
Karachi dated the 22<sup>nd</sup> March, 2016

### NOTIFICATION

NO SO(WD)/WDD/2-100/2016: In exercise of the powers conferred by Section 10 of the Sindh Child Marriages Restraint Act, 2013 (Sindh Act No. X V of 2014), the Government of Sindh are pleased to make the following Rules namely:-

#### Chapter I PRELIMINARY

1. **Short title and commencement-** (1) These rules may be called 'The Sindh Child Marriages Restraint Rules, 2016'.  
(2) They shall extend to the whole province of Sindh.  
(3) They shall come into force at once.
2. **Definitions-** In these rules, unless there is anything repugnant in the subject or context,
  - (a) "Act" means 'The Sindh Child Marriages Restraint Act, 2013 (Sindh Act No. XV of 2014).
  - (b) "Child Protection Institute" means any such government facility or registered voluntary organization established for the admission, care, protection and rehabilitation of persons, particularly children and women and may include remand houses, shelter homes, bostral institutions etc
  - (c) "Child Victim" means a person below the age of 18 who is a contracting party in a child marriage
  - (d) "Code" means Code of Criminal Procedure 1898 (Act V of 1898)
  - (e) "Committee" means District Monitoring Committee constituted under this Act.
  - (f) "Court" means court of the Judicial Magistrate of the First Class
  - (g) "CNIC" means Computerised National Identity Card
  - (h) "Facilitation" means making an action or process easier or providing help and assistance in the Provincial Committee of an action or process
  - (i) "Faith" means religion
  - (j) "Government" means Provincial Government of Sindh

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direct, bring about or facilitate a child marriage is liable to punishment under the Act. This may include parents of the contracting parties, relatives of the child, the Nikkahkhwah or any person solemnizing the marriage, those providing the space or premises where the marriage is contracted and celebrated etc.

#### Chapter - III Mechanism of Complaints

5. **Complaint to the Magistrate-** (1) Any person may lay an application before the Court of a Judicial Magistrate of First Class that a child marriage is going to be arranged, or is about to be solemnized or has been solemnized.
  - (2) An application can be laid down in any of the following jurisdictions:-
    - (i) where the child victim resides;
    - (ii) where the accused resides or works;
    - (iii) the location where the child victim may be residing at during pendency of the trial
  - (3) The Court shall proceed according to the provisions laid down in rule 7 of these rules:  
*Provided* that this provision is in addition to the existing process of the Criminal Procedure Code 1898.  
*Provided* further that the Court may take cognizance of any complaint or First Information Reports registered with the police.
  - (4) Where an application is filed under section 7 (1) of the Act, the Court may issue notices as per the Civil Procedure Code 1908 and the Code of Criminal Procedure 1898 by all three modes at once, namely, through Bailiff, posting and publication all at once and if notice is served by any of these modes, the notice shall be deemed to have been served.
6. **Complaint to the Police-** (1) The provisions of the Code of Criminal Procedure 1898 (Act V of 1898) shall be applicable to any complaints made or First Information Reports registered under the Act unless expressly provided otherwise in the Act or these Rules.
  - (2) Any police officer failing to register or investigate a case of child marriage based on a complaint brought before him shall be liable to offences under the Pakistan Penal Code, 1860 (Act XI.V of 1860).
7. **Provisions of Criminal Procedure Code 1898 to Apply.** Except as expressly provided under the Act or these Rules, the procedure to be followed shall be in accordance with the provisions of the Code of Criminal Procedure.

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(k) "informed and voluntary consent" means consent which is given freely without any coercion, undue influence, fraud or misrepresentation by an adult with full knowledge of the implications of the consent and any alternatives;

(l) "Monitoring Committee on Child Marriage" mean a Committee constituted under these rules;

(m) "spouse" means husband or wife;

(n) "relatives" means any person related to the child through blood, kinship or marriage;

(2) The words and expressions used but not defined in these rules shall have the same meanings respectively assigned to them in the Act.

#### Chapter II:

##### Age of Contracting Parties and Persons Liable Under the Act

3. **Ensuring Age of Parties-** (1) Any person performing, conducting or solemnizing the marriage must ensure that the bride and the bridegroom are aged 18 or above as per the Act.  
He shall provide a signed affidavit stating that he has satisfied himself about the age of the contracting parties as not being less than 18 years. Such affidavit shall be attached with the nikahnama

(2) An attested copy of a valid CNIC of both contracting parties shall be attached with the nikahnama, marriage contract or any other documentation having the same effect.

*Explanation:* The copies of the CNIC may be attested by a Nikkah Registrar having license under Section 5 of Muslim Family Laws Ordinance, 1961 and attached with nikahnama for registration of marriages.

(3) If a CNIC of either party to the marriage is not available, the parties may attach a medical certificate verifying the age of the parties.

(4) Any person or institution providing a medical certificate verifying age of a person shall sign and provide an affidavit stating that he has satisfied himself about the age of the person examined. Such affidavit shall be attached with the nikahnama, marriage contract or any other document having the same effect.

(5) Fabricating of false evidence, statement or affidavit shall be liable to prosecution as per the Pakistan Penal Code 1860 (Act XI.V of 1860).

4. **Performing, conducting, directing, bringing about or facilitating a Child Marriage-** As per section 4 of the Act, any person who may perform, conduct,

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#### Chapter VI -

##### Rescue, Custody and Special Procedures for Victims of Child Marriage

8. **Rescue and recovery of child victim-** A police officer or any person given such authority under the law upon receiving information that a child marriage is going to be arranged or solemnized or has been solemnized, may upon investigation take into custody a child alleged to be the victim of child marriage and produce her or him before the Court within twenty-four hours of taking the child into such custody.

*Provided* that where a child is in the custody of her or his parent or guardian and the parent or guardian are not alleged offenders under the Act, the officer shall not take her or him into custody but shall in the first instance, make a report to the Court.

*Provided* further that the first proviso shall not be applicable in case of where the alleged accused is a parent or guardian or any other person in any capacity, lawful or unlawful.

*Provided* that where the child is of another faith than that of her or his spouse or intended bridegroom or bride, she or he immediately be taken into custody in the first instance.

9. **Warrant to search for child-** (1) If it appears to a Court from information received on oath or solemn affirmation laid by any person who, in the opinion of the Court, is acting in the interest of the child that there is reasonable cause to suspect that an offense has been or is being committed or unless immediate steps be taken will be committed in respect of the child, the Court may make orders to any police officer or any person authorized under the law to search for such child and if it is found that the child is a victim or intended victim of child marriage, to remove her or him and deal with her or his custody in accordance with the provisions of these Rules and in the best interests of the child.

(2) The officer executing the warrant shall be accompanied by the person laying the information, if such person so desires and may also, if the Court by whom the warrant is issued so directs, be accompanied by the police or any person so authorized by the law or Court or by both.

(3) The Court issuing a warrant under this rule may in its discretion by the same warrant direct that any person accused of any offense in respect of the child be apprehended and brought before it, or direct that if such person executes a bond with sufficient sureties for his attendance before the Magistrate at a specified time and thereafter until otherwise directed by the Magistrate, the officer to whom the warrant is directed shall take such security and shall release such person from custody.

10. **Temporary custody-** (1) Where a child victim is taken into custody in accordance with rule 8 and rule 9, she or he shall immediately be produced before the Court and if immediate production of the child before the Court is not possible due to any reason, shall immediately be taken to the nearest child protection institution for temporary custody till her or his production before the Court within the stipulated time.

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(2) Where the child victim is of another faith than her or his spouse, intended bridegroom or bride, she or he shall be given temporary custody in a child protection institution during the pendency of the trial for the best interests of the child.

(3) While providing temporary custody as per sub-rule (2), the court may use its discretion and in the best interests of the child and in the interest of security, withhold the information of the location of the child from any person with the exception of necessary official personnel.

(4) Any person who discloses the location of the child victim shall be liable to penalties as contempt of court as under the Contempt of Court Act 1976 (Act No. LXIV OF 1976) and any other penalties deem fit by the Court.

(5) The child may be allowed to meet her or his parents, guardians, husband, intended bridegroom or in laws only upon her or his informed voluntary written consent in the best interests of the child.

*Provided* that any such meeting shall be supervised by a police officer, senior employee of the child protection institution or any other person authorized by the court.

*Provided* further that any such meeting may be given police protection at the discretion of the court.

**11. Court may direct production of child by parent or guardian.**— The Court to which a report is made under the first proviso of rule 8, may —

(i) call upon such parent or guardian to produce the child before it and show cause why the said child should not, during the pendency of the proceedings, be removed from their custody; and may order the child to be admitted in a child protection institution or on suitable surety being offered for the safety of such child and for her or him being brought before it, permit the child to remain in the custody of her or his parent or guardian; or

(ii) if it appears to the Court that the child is likely to be removed from the jurisdiction of the Court or is concealed, and order her or his immediate admission to a child protection institution.

**12. Examination of person producing or reporting.**— (1) The Court before which a child is brought under rule 8 or is produced under rule 11 shall examine on oath the person who has brought the child or made the report and record the substance of such examination and may order the admission of the child to a child protection institution pending any further inquiry, if any in the best interests of the child.

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(2) On the date fixed for the production of the child or for the inquiry or on any subsequent date to which the proceedings may be adjourned, the Court shall hear and record substance of the evidence which may be adduced and consider any cause which may be shown why an order directing the child to be admitted to a child protection institution or be given in the care of a suitable person should not be passed in the best interests of the child.

**13. Special Circumstances to be adopted.**— (1) In situations where the child is not of the same faith as her or his spouse, intended bridegroom or bride, special measures may be put in place during the investigation and trial of the matter at the discretion of the court and in the best interests of the child. These special measures may include but not be limited to:-

- (i) holding the trial in a different and secure location;
- (ii) withholding the location of the child from any person with the exception of necessary official personnel;
- (iii) any person who makes known the child's location be liable to legal action against them;
- (iv) taking the child's statement and evidence outside the court premises and in a secure location;
- (v) providing police protection during transport of the child victim from court or the location where her or his statement may be recorded;
- (vi) passing an order or injunction to prohibit a child marriage; removal of child from jurisdiction of the court or police station or any other necessary order as per the circumstances;
- (vii) initiate immediate and fast tracked divorce proceedings if the accused is found guilty upon the informed and voluntary consent of the child victim.

(2) The Court shall take appropriate measures to provide adequate security to the prosecution witnesses, investigating officers, prosecutors, the child victim, her or his family and the Judges during the pendency of investigation and trial, and if necessary, post the trial.

(3) The Court may use its discretion, with permission from the Chief Justice, High Court of Sindh, to transfer the case to the jurisdiction of another Court or Province if due to the insecurity or the political situation in the local area may result in difficulty of ensuring the safety of persons involved in the investigation and trial or where there is fear that there cannot be a Fair Trial as understood by Article 10 of the Constitution of the Islamic Republic of Pakistan 1973.

(4) In case of transfer of a case as per sub-rule (3), it may not be necessary for the new Court to recall any witness or again record any evidence that may be needed.

**14. Presence of Persons in cases involving a Child.** No person shall be present at any sitting of a Court involving a case of a child with the exception of those identified in these rules hereunder:-

- (i) the members and officers of the Court;
- (ii) the parties to the case before the Court and other persons directly concerned in the case including the police officers; and

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(iii) such other persons as the Court specially authorizes to be present.

**15. Withdrawal of Persons from Courts.** If at any stage during the course of a trial of a case or proceeding, a Court considers it expedient in the best interest of the child to direct any person, including the parent, guardian or the child's spouse or intended bride or bridegroom or the child herself or himself to withdraw, the Court shall be entitled to give such direction and thereupon such person shall withdraw. If any person refuses to withdraw, the Court may take steps to remove him and hold him in contempt of court as under the Contempt of Court Act 1976 (Act No. LXIV OF 1976).

**16. Withdrawal of persons from Court when child is examined.** (1) If at any stage during the course of a trial of a case, a child is examined, any court trying the case or holding the proceeding may direct such persons as it thinks fit, not being parties to the case or proceeding their legal advisors and the officers concerned with the case or proceeding, to withdraw, such persons shall then withdraw. If any person refuses to withdraw, the Court may take steps to remove him and hold him in Contempt of Court as per (Act No. LXIV OF 1976).

(2) The Court may use its discretion and allow the examination of the child to be conducted in camera, in another secure location or through video link or employ any other such means if necessary in the best interests of the child.

*Provided* that if the child is of another faith than her or his spouse, intended bridegroom or bride, the examination of the child shall be conducted in the manner identified in sub-rule (2).

**17. Dispensing with Attendance of Child.** If at any stage during the course of the trial of a case or proceeding, a Court is satisfied that the attendance of a child is not essential for the purposes of the hearing of the case or proceeding, the Court may dispense with her or his attendance and proceed with the trial of the case in the absence of the child.

**18. Prohibition on Publication of Names, Addresses of Children Involved in Cases or Proceedings.** No report in any newspaper, magazine or news sheet of any case or proceeding in any Court under these in which a child is involved shall disclose the name, address or school or include any particulars calculated to lead directly or indirectly to the identification of any such child, nor shall any picture be published as being or including a picture of any such child in the best interests of the child.

*Provided* that for reasons to be recorded in writing, the Court trying the case or holding the proceeding may permit the disclosure of any such report, if in its opinion such disclosure is in the interest of child welfare and is not likely to affect adversely the best interest of the child concerned.

**19. Entrustment of the custody of child victim.**— (1) If the Court is satisfied that the child brought before it is a victim of child marriage and that it is expedient to deal with her or him, the Court may order in the best interest of the child, that he or she be admitted to a child protection institution or her or his custody be entrusted to a

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suitable person, who is able and willing to look after the child, until such child attains the age of eighteen years, or in exceptional cases for a shorter period.

(2) The Court which makes an order for entrusting a child in the custody of a suitable person may, when making such an order, require such person to execute a bond, with or without sureties, as the Court may direct, undertaking to be responsible for the care, education and well-being of the child and for the observance of such other conditions as the Court may impose for ensuring welfare of the child.

(3) The Court making an order for entrusting the custody of a child to a suitable person under this rule, may order submission of periodical reports as to the welfare of the child to the Court by an authorized officer.

(4) The Court may from time to time during the custody of a child by an authorized person, compel the production of the child in the Court to satisfy itself that the conditions of such custody are being carried out.

(5) If at any time it appears to the Court, from information received from any source that there has been a breach of any condition contained in the bond, it may, after making such inquiry as it deems fit, order the child to be admitted into a child protection institution or be entrusted to the custody of any other suitable person.

**20. Sending of child having place of residence outside jurisdiction.**— (1) In the case of a child victim of child marriage whose ordinary place of residence is not within the jurisdiction of the Court, the Court may direct that the child shall be kept in such custody and be produced before a Court having territorial jurisdiction over the place of residence of the child or to deal with her or his custody in any other manner provided in the Rules.

(2) Where a child is produced before a Court on the direction of any other Court passed under the foregoing provision of this rule, such Court may regulate the custody of the child as if the child had been produced before it in terms of rule 8 or rule 11 of these Rules.

**21. Period of custody.**— Subject to any order of the Court, a child ordered to be admitted to a child protection institution shall be kept in such custody till he or she attains the age of eighteen years in the best interest of the child.

**22. Contribution of parents.**— (1) Where an order has been made for the admission of a child into child protection institution or giving the custody of the child to a suitable person, the Court may direct a parent or guardian, in a suitable case, to pay maintenance of the child at such rates as may be determined by the Court:

*Provided* that while passing any such order, the Court shall take into consideration the capacity of the parent or guardian to pay maintenance.

(2) In case of non-compliance of the direction for the payment of maintenance issued under sub-rule (1), the Court may recover the amount from the parent or guardian as arrears of land revenue or directly from the place of employment of parent or guardian.

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23. **Monitoring of Child Protection Institutes.** Child Protection Institutes shall be monitored as per procedures laid down in Sindh Children Act 1955 (Act XII of 1955) and any other mechanisms or rules laid down by the Child Protection Authority formed by the Child Protection Authority Act 2011 (XIV OF 2011) or Government, as the case may be.

**Chapter-IV**  
**Provincial Monitoring Committee on Child Marriage**

24. **Establishment of the Provincial Monitoring Committee on Child Marriage.** (1) Government shall constitute a Committee to be called as the Monitoring Committee on Child Marriage (hereby referred to as "Provincial Committee"), which shall be established in Karachi to exercise the powers conferred upon, and to perform the functions assigned to it.

(2) The Provincial Committee shall consist of a Chairperson and eighteen Members.

(3) The Secretariat of the Provincial Committee shall lie with the Women Development Department, Government of Sindh.

(4) The Chairperson shall be the Secretary of the Women Development Department.

(5) The Members of the Committee shall include -

- (i) The Additional Secretary of the Women Development Department, who shall be the Secretary of the Committee.
- (ii) Seven (7) ex-officio members who shall be representatives of the Departments of Law, Finance, Social Welfare, Home, Human Rights, Education and Health, not below the rank of Additional Secretary, and who shall not have the right to vote;
- (iii) Provincial Ombudsperson for Protection Against Sexual Harassment;
- (iii) Chairperson, Sindh Commission of Human Rights;
- (iv) Chairperson, Sindh Commission on the Status of Women;
- (v) Representative of the Child Protection Authority;
- (vi) Two eminent persons of civil society;
- (vii) Two persons of the legal fraternity, one of whom shall be nominated by the Sindh Bar Council;
- (viii) Two persons of the media to be nominated by Government.

Provided that at least one-third of the members shall be women.

25. **Appointment of Members of the Provincial Committee.** The Women Development Department, Government of Sindh in consultation with the Sindh Human Rights Commission shall compile a list of candidates fulfilling the qualifications identified in rule 26, and present them to the Secretary Women Development Department, who shall notify the Provincial Committee.

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29. **Acting Chairperson.** By reason of a vacancy in the office of Chairperson due to death, illness, resignation or otherwise, the Chief Minister shall appoint the another woman from amongst the members of the Provincial Committee to act as Chairperson for a period of not exceeding thirty days or until the appointment of a new Chairperson, whichever is earlier.

(2) The Women Development Department shall have the administrative and financial responsibility of the Committee.

(3) There shall be a separate desk, office for record keeping and staff within the Women Development Department at Karachi.

(4) Extra staff may be hired by the Women Development Department if and when deemed necessary.

31. **Role and Responsibilities of the Committee.** The role and responsibility of the Provincial Committee shall include -

- (a) review from time to time the existing provisions of the law of Sindh Child Marriage Restraint Act 2013, and other laws related to child marriage and suggest amendments therein, if any;
- (b) call for specific studies or investigation into specific incidence of child marriage;
- (c) look into complaints and take suo moto notice of matters relating to child marriage and the non-implementation of the law;
- (d) participate and advise on the planning process for securing a safe environment free of child marriages; and
- (e) mobilize grants from domestic and international sources in order to meet any of its obligations and for the performing of its functions;
- (f) oversee the functioning of the District Watch Committees; and
- (g) any other functions that may be necessary to achieve the objectives of the Act and these rules.

32. **Functioning of the Provincial Committee.** (1) The Committee shall meet at least quarterly at such times and at such place as the Chairperson may decide. The Chairperson may call additional meetings if and when required.

(2) All decisions of the Provincial Committee shall be authenticated by the signature of the Chairperson or any person authorized in this behalf by the Chairperson.

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26. **Qualification of members.** (1) The ex-officio members and their delegated representatives shall not be below the rank of Deputy Secretary.

(2) Members from civil society shall have at least ten (10) years of experience working on human rights and children issues.

(3) The member nominated by the Sindh Bar Council shall have at least ten (10) years experience working on human rights cases and cases involving children's issues.

(4) The member of the legal fraternity not nominated by the Sindh Bar Council shall have at least ten (10) years experience working on children's rights.

(5) Members from the media shall have at least ten (10) years experience working, reporting or researching on children's rights and issues.

(6) Members of the Provincial Committee shall be deemed to be public servants within the meaning of section 21 of the Pakistan Penal Code (Act XLV of 1860).

27. **Term of Office of Member of the Committee.** (1) A person appointed as a Member of the Provincial Committee shall hold office for a term of three years from the date on which he or she enters upon his or her office which shall be extendable for further one term only.

(2) The Member may resign his or her office in writing under his or her hand addressed to Chairperson of the Provincial Committee and on acceptance of such resignation; such vacancy shall be filled within thirty days for the unexpired term of the member.

28. **Removal of Members.** - The Members may be removed from office by the Chief Minister if he or she, as the case may be -

- (a) is, after proper inquiry, found guilty of misconduct;
- (b) is adjudged an insolvent;
- (c) is unfit to continue in office by reason of being mentally or physically challenged and stands so declared by a competent medical authority;
- (d) does not attend two consecutive meetings without a justifiable reason; and
- (e) has, on conviction of any offence involving moral turpitude, been sentenced to imprisonment for a term of not less than two years, unless a period of five years has elapsed since his or her release.

**Explanation.** - "Misconduct" shall include behavior which is found to be discriminatory or biased against women.

**Explanation-II:** An inquiry shall be carried out into any charge of "misconduct" by two members of the Committee and one independent member.

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(3) The quorum for the meeting of the Provincial Committee shall not be less than one third of the total voting strength of the Provincial Committee.

(4) The decisions of the Provincial Committee shall be taken by the majority of the members present and in case of a tie, the Chairperson of the meeting shall have the casting vote.

(5) No act or proceeding of the Provincial Committee shall be invalid on the ground merely of the existence of any vacancy in or defect in the constitution of the Provincial Committee.

(6) While inquiring into complaints of violations of women's rights, the Provincial Committee may call for information or report from departments of Government, civil society organizations and autonomous or concerned bodies; and in this regard the Committee shall have the powers vested in a civil court under the Code of Civil Procedure, 1908 (Act V of 1908) for enforcing the attendance of any person and compelling the production of documents.

33. **Annual Report of the Provincial Committee.** - (1) The Provincial Committee shall prepare its Annual Report which shall be presented to the Chief Minister and concerned Department. The Annual report shall include an account of its performance and utilization of funds.

(2) The Annual Report of the Provincial Committee shall be laid and discussed in the Provincial Assembly.

34. **Assistance to the Provincial Committee.** - All executive authorities of Province and departments shall assist the Committee in the performance of its functions.

**Chapter - IV**  
**District Monitoring Committees**

35. **Establishment of the District Monitoring Committees.** (1) The Women Development Department shall constitute a District Monitoring Committees in each district referred to as "the District Committee", which shall be established in each district to exercise the powers conferred upon, and to perform the functions assigned to it by Women Development Department.

(2) The District Committee shall consist of minimum eleven members but not more than fourteen members.

(3) The Chairperson of the District Committee shall be the Deputy Commissioner of the concerned District.

(4) The Members of the District Committee shall include -

- (i) District Officer of Women Development Department, who shall be the Secretary of the District Committee;

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- (ii) District Officers of the Education, Health, Social Welfare not below the rank of BPS-17
- (iii) Representatives from Police Department not below the rank of DSP;
- (iv) Officer / incharge of Child Protection Unit;
- (v) One advocate having experience in the child rights nominated by the District Bar Council;
- (vi) Two members from Civil Society Organizations;
- (vi) One member from media;
- (vii) One member from minority;
- (viii) Member(s) of the Domestic Violence Protection Committee
- (ix) Probation Officer; and
- (x) any other person notified by the Women Development Department

*Provided* at least one-third of the Committee shall consist of women.

**36. Appointment of Members of the Committee.-** (1) The Women Development Department through its district offices shall compile a list of candidates fulfilling the qualifications identified in rule 27, and present them to the Secretary of Women Development Department who shall make a final selection in consultation with the Provincial Committee.

(2) If, for any reason whatsoever a person identified in the sub-rule (1) is not available in a district, the Women Development Department in consultation with the Committee shall appoint any other person in their place on the basis of a majority vote.

**37. Acting Chairperson.-** By reason of a vacancy in the office of Chairperson due to death, illness, resignation or otherwise, the District Committee shall through majority vote appoint another person from amongst the members of the District Committee to act as the Chairperson for a period of not exceeding thirty days or until the appointment of a new Chairperson, whichever is earlier.

**38. Qualification of Members.-**Members of the District Committee must have the following qualifications:-

- (i) Members from civil society and minority member shall have at least ten years of experience working on human's rights and issues with a focus on children;
- (ii) The member nominated by the District Bar Association shall have at least ten years' experience working on human rights cases and cases involving child rights'
- (iii) Members from the media shall have at least ten years experience working, reporting or researching on human rights and child rights issues;
- (iv) Members of the Committee shall be deemed to be public servants within the meaning of section 21 of the Pakistan Penal Code (Act XLV of 1860)

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**39. Term of Office of Member of the Committee.-** (1) A person appointed as a Member of the District Committee shall hold office for a term of three years from the date on which he or she enters upon his or her office. The term of the office may be extended only once.

(2) The Member of the District Committee may resign his or her office in writing under his or her hand addressed to Chairperson of the District Committee and on acceptance of such resignation; such vacancy shall be filled within thirty days for the unexpired term of the member.

**40. Removal of Chairperson and Members.-** The Members may be removed from office by the Minister, Social Welfare if he or she, as the case may be-

- (a) is, after proper inquiry, found guilty of misconduct;
- (b) is adjudged an insolvent;
- (c) is unfit to continue in office by reason of being mentally or physically challenged and stands so declared by a competent medical authority;
- (d) does not attend two (2) consecutive meetings without a justifiable reason; and
- (e) has, on conviction of any offence involving moral turpitude, been sentenced to imprisonment for a term of not less than two years, unless a period of five years has elapsed since his or her release.

**Explanation:-** "Misconduct" shall include behavior which is found to be discriminatory or biased against children.

**Explanation-II:** An inquiry shall be carried out into any charge of 'misconduct' by two members of the Provincial Committee and one (1) independent member.

**41. Secretariat of the Committee.-** (1) The Secretariat of the District Committee shall lie with the Women Development Department.

(2) The Women Development Department shall have the administrative and financial responsibility of the District Committee.

(3) There shall be a separate desk, office and staff for record keeping and monitoring within the office of district offices of Women Development Department.

(4) Extra staff may be hired by the Women Development Department if and when deemed necessary.

**Provided** that if for any reason the Women Development Department is unable to hold a Secretariat of a District Committee, the Chief Minister may appoint another provincial department to hold the Secretariat and report to the Secretary, Women Development Department.

**42. Role and Responsibilities of the District Committee.-** The roles and responsibilities of the Committee as identified shall include -

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# Annexure B2

## The Sindh Reproductive Healthcare Rights Act, 2019 Sindh ACT NO. XV OF 2019

PROVINCIAL ASSEMBLY OF SINDH  
NOTIFICATION  
KARACHI, THE 10<sup>TH</sup> DECEMBER, 2019

NO.PAS/LEGIS-B-20/2019- The Sindh Reproductive Healthcare Rights Bill, 2019 having been passed by the Provincial Assembly of Sindh on 13<sup>th</sup> November, 2019 and assented to by the Governor of Sindh on 29<sup>th</sup> November, 2019 is hereby published as an Act of the Legislature of Sindh.

### THE SINDH REPRODUCTIVE HEALTHCARE RIGHTS ACT, 2019.

#### SINDH ACT NO. XV OF 2019

##### AN ACT

to facilitate reproductive healthcare and promote reproductive health rights in the Province of Sindh.

**WHEREAS** it is expedient to facilitate reproductive health care and promote reproductive health care rights in the Province of Sindh. **Preamble.**

It is hereby enacted as follows:-

1. (1) This Act may be called the Sindh Reproductive Healthcare Rights Act, 2019. **Short title, extension and commencement.**  
(2) It shall extend to the whole of the Province of Sindh.  
(3) It shall come into force at once.

2. In this Act, unless there is anything repugnant in the subject or context – **Definitions.**

- (i) "choice" means to decide freely as how to manage reproductive life;  
(ii) "confidentiality" means to assure not to disclose or share any personal information relating to reproductive health with others;  
(iii) "continuity" means a constant process of receiving reproductive health care services for lifetime;  
(iv) "discrimination" means any exclusion, restriction or arbitrary distinction, made on the basis of sex having effect or purpose of impairing or nullifying the recognition or exercise by women and men, irrespective of marital status, in the political, economic, social, cultural, civil or any other field.  
(v) "gender perspective" means the beliefs, roles, values and behaviors which evolve for socialization of men and women by culture and society;  
(vi) "Government" means the Government of Sindh;  
(vii) "information" means the knowledge of benefits and availability of reproductive health care services and healthcare rights in this regard;

(viii) "informed consent" means the possibility and opportunity to make a responsible decision based on comprehensive information, free from coercion or violence;

(ix) "maternal morbidity and mortality" means pregnancy related ill health and deaths of women in a place and at a time;

(x) "prescribed" means prescribed by rules;

(xi) "privacy" means to have a confidential environment during counseling and services relating to reproductive health and health care rights;

(xii) "reproductive health" means a state of complete physical, mental and social wellbeing, but does not merely mean the absence of disease and infirmity, in all matters relating to the reproductive system, its functions and processes;

(xiii) "reproductive health care providers" means public and private institutions which offer reproductive health care services as well as the staff which is working with such institutions;

(xiv) "reproductive right" means the right of a couple to reach the highest level of reproductive health, without discrimination, coercion and violence; and

(xv) "rules" means the rules and regulations made under this Act.

(xvi) "regulations" means the regulations made under this Act.

3. **Basic Principles.** — The facilitation of reproductive health care and promotion of reproductive health care rights in the Province of Sindh shall be in accordance with the following basic principles: **Promotion of Reproductive Healthcare Rights Acceptance of facts.**

i) men and women are the subject of reproductive health care and they are jointly involved and responsible for parenting and are equally entitled to access to information relating to reproductive health care and reproductive rights;

ii) there is a need for developing public awareness which prevents maternal deaths and suffering of women and children.

4.(1) The right of reproductive healthcare information shall be promoted - **Promotion of reproductive healthcare rights.**

(a) by providing reproductive healthcare information, which provides awareness regarding mental and physical health and wellbeing of individuals and families, and allows the service users to make all decisions on the basis of full, free, and informed consent;

(b) through parental responsibility, which assures the right of parent as educators;

(c) by including reproductive health education in the curriculum at the secondary and higher secondary school levels as "life skills".

(2) The right to gender neutral information shall be promoted-

- (a) by access to information related to the reproductive rights and responsibilities with a gender perspective, which is free from stereotype, discriminatory, coercive and obscurantist customs and is presented in an objective and pluralistic manner;
- (b) by recognition that the couple have the right to information whether to start or plan a family including spacing, timing and the number of their children;
- (c) by public awareness on the prevalence and impact of morbidity and mortality and availability of medical science to prevent this suffering.

(3) The right to equality and to be free from all forms of discrimination shall be promoted by ensuring that-

- (a) no person is discriminated in their reproductive lives, in access to services and information on the grounds of race, color, sex, creed, social status, religion or any other criteria of discrimination;
- (b) all women have the right to protection from discrimination in social, domestic or employment spheres by reasons of pregnancies or motherhood "as prescribed";
- (c) elimination of all discrimination against either gender in health care and providing family planning services;
- (d) all persons have a right to make independent decisions about their reproductive rights and the right to have decisions respected by others;
- (e) women are empowered for their reproductive well-being.

(4) All persons shall have the right to be free from ill treatment and to be protected from sexually transmitted diseases such as HIV/AIDS, rape, sexual assault, sexual abuse, sexual harassment and other forms of gender-based violence.

5.(1) The need of reproductive healthcare shall be accepted in the following order:-

- (i) to provide quality reproductive healthcare through short and long term efforts comprising among others, to professionalize obstetric care, emergency obstetric and neonatal care;
- (ii) to improve reproductive healthcare systems, particularly in the primary health care sector;
- (iii) to reach underserved persons by increasing access to the disadvantaged and vulnerable by strengthening the basic health units, "rural health centers," MCH Centres, Family Welfare Centers for the provision of family planning, maternal and neonatal healthcare, in addition to other services;

**Promotion and Facilitation of Reproductive Healthcare Services**

(iv) to support in diverse ways and means, provision of family planning services;

(v) to meet health needs or requirements of men and women by or through -

- (a) family planning services for prevention of unsafe and unplanned pregnancies;
- (b) observance of World Health Organization (WHO) standards of ante-natal, inter-natal and post natal care including post abortion care which reduces the incidences such as involuntary miscarriage and to increase access to skilled birth attendants;
- (c) ensuring pre-service training to all reproductive health care providers by including it in the curriculum of healthcare providers and communities.

6. The facilitation of reproductive healthcare services shall focus on the following, namely:-

**Reproductive healthcare services.**

- (a) provision of full range of integrated services including family planning which shall address the maternal mortality and morbidity;
- (b) provision of quality family planning services through a range of mixed methods which may include short term, long term and permanent methods, and also includes new methods based on informed choice and that the facilities are visible to the communities through better promotion and branding;
- (c) broadening the scope of Family Planning and/or Reproductive Health Services to various geographical areas, adoption of task shifting model so that the mid "level" workers are involved in provision of services where needed;
- (d) provision of services to reduce infant and neonatal mortality, decrease preterm and stillbirths, all of which are linked to multiple pregnancies without birth spacing;
- (e) strengthening the reproductive health care system to ensure quality services by the reproductive health providers which may encourage informed choice and are given in an environment of dignity, confidentiality and continuity;

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(f) ensuring commodity security and sustainability so that there is no disruption in the provision of reproductive health care services;

(g) training of reproductive health care providers to be gender sensitive and to reflect user perspective to the right to privacy and confidentiality and also training in interpersonal and communication skills;

(h) enforcement of the public sector approved Manual on Family Planning Standards;

(i) focusing and prioritizing the development and strengthening of the primary health care sector in terms of its access and affordability in reproductive health care;

(j) recognizing that all persons shall have the benefit of and access to available reproductive healthcare technology, including that relating to infertility, which is safe and free from gender discrimination and no person shall be subject to medical trials related to reproductive healthcare without their full, free, informed and written consent;

(k) provision of reproductive healthcare services to persons in privacy and ensuring personal information given thereof is kept confidential;

(l) managing the reproductive life of all persons having regard to the rights of others;

(m) response to disaster situations by Government, which shall include the provision of the Minimum Initial Service Package on Sindh Reproductive Health in crises, and

(n) no person shall be subjected to forced sexual intercourse, pregnancy, sterilization, abortion or birth control.

7.(1) The Health and Population Departments of the Government shall be responsible for oversight of this Act and shall give effect to the provisions herein through all concerned public sector organizations and public-CSO-private partnership and private organizations.

**Health and Population Departments to enforce the provisions of the Act.**

(2) The Health Department in consultation with any other Department shall lay

before the Provincial Assembly, an Annual Report regarding the progress of the implementation of the provisions of this Act

8. Government may make rules for carrying out the purposes of this Act. **Power to make rules.**

9. The provisions of this Act shall have effect notwithstanding anything contrary contained in any other law, for the time being in force. **Over-riding effect.**

10. If any difficulty arises in giving effect to the provisions of this Act, the Government may, by order published in the official Gazette, make such provision not inconsistent with the provisions of this Act, as appear to it to be necessary or expedient for removing the difficulty. **Power to remove difficulties.**

**BY ORDER OF THE SPEAKER  
PROVINCIAL ASSEMBLY OF SINDH**

**G.MUMAR FAROOQ  
SECRETARY  
PROVINCIAL ASSEMBLY OF SINDH**

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